

**CHOOSING TRIBAL LAW:
WHY STATE CHOICE-OF-LAW PRINCIPLES SHOULD APPLY
TO DISPUTES WITH TRIBAL CONTACTS**

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Introduction

In the past few decades, the Supreme Court has decided a series of cases purporting to clarify the respective roles of state and tribal courts in adjudicating disputes that involve Indian litigants or arise in Indian country. As a result, a detailed set of rules now governs whether such suits must be filed in a state or tribal forum. Since the foundational case of *Williams v. Lee*,¹ for example, it has been clear that a non-Indian plaintiff whose case concerns an Indian defendant and an on-reservation transaction must file suit in tribal court. More recently, the Supreme Court has effectively required that suits against a non-Indian arising out of events on privately owned land generally must be brought in state court.

In other situations — for example, a lawsuit that involves non-Indians, but arguably concerns core matters of tribal sovereignty — the proper choice of forum is more uncertain. It may be a close question whether the suit may be brought in tribal court or must be filed in state court, and the ultimate determination of which forum is proper may turn on seemingly inconsequential facts: whether, say, the tribe or the state had responsibility for maintaining the highway on which an accident occurred,² or whether alleged spoliation of evidence occurred on or off the campus of a tribal college.³

¹ 358 U.S. 217 (1959).

² See *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

³ See *Smith v. Salish Kootenai College*, No. 03-35306, (9th Cir. Jan. 10, 2006) (en banc) (slip opinion). In *Smith*, the Ninth Circuit found that the Confederated Salish and Kootenai Tribes could assert jurisdiction over a spoliation of evidence claim against a nonmember. Among the factors the Ninth Circuit considered was the degree of the suit's "connection to Indian lands," which in turn required it to consider where the alleged destruction of notes from an accident investigation report undertaken by Salish Kootenai College had occurred. The college was located on tribal lands; thus, though the record was not clear about where the notes had in fact been destroyed, the court nonetheless found that the college "had control over the notes" and that their loss or destruction thus involved "activities conducted or controlled by a tribal entity on tribal lands." Slip. op. at 119.

The question of which *court* should hear cases implicating tribal interests thus often requires a complex and technical answer. It is therefore all the more remarkable that courts considering such cases have devoted almost no attention to the question of which *law* should apply once a forum has been chosen.⁴ Instead, the Supreme Court has repeatedly suggested that the jurisdictional reach of tribal courts is identical to the scope of the tribe's legitimate regulatory interests⁵; similarly, state courts have often assumed that cases heard in state court will necessarily be governed by state law.⁶ As a result, courts have tended to treat the issues of which forum should hear a case and which law should be applied to it as if they were a single question — simply assuming, without explicit consideration of the issue, that the forum in which the case is brought will apply its own law.

This assumption, to be sure, does not entirely lack foundation. Under current jurisdictional rules, cases involving Indians and arising on tribal land must generally be heard in tribal court, while cases against nonmember defendants are usually restricted to state court. In such situations, because the case likely arises in the forum and involves parties who have links to it, most choice-of-law theories would dictate that the forum should apply its own law.⁷

⁴ See Katherine C. Pearson, *Departing from the Routine: Application of Tribal Law under the Federal Tort Claims Act*, 32 Ariz. St. L.J. 695, 725 (2000) (noting that “the focus in federal Indian law cases has often been on adjudicative authority or jurisdiction to decide disputes, rather than on the choice-of-law used by the jurisdiction to decide disputes”).

⁵ See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (“As to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.”).

⁶ See Laurie Reynolds, *Adjudication in Indian Country: The Confusing Boundaries of State, Federal, and Tribal Jurisdiction*, 38 Wm. & Mary L. Rev. 539, 558 (1997) (noting that, for many state courts, “the presence of substantial off-reservation contacts automatically has a two- pronged result: the state court has adjudicatory jurisdiction, and state law applies to the dispute”).

⁷ See, e.g., Restatement (Second) of Conflict of Laws (1971) § 145, § 188 (providing that, in both tort and contract cases, parties' domicile and the place of relevant events are important factors in determining which law to apply).

Further, there are historical and philosophical reasons why tribal law and tribal courts should be closely tied together. Tribal courts are often an integral part of tribal life; indeed, the federal government has supported tribal judicial systems as a primary means of fostering tribal autonomy.⁸ There may also be practical difficulties in applying tribal law in nontribal forums. In some tribes, tribal law is administered by elders who may not speak English⁹; in others, the procedures tribal courts use to resolve disputes are inextricable from substantive law.¹⁰ Moreover, tribal and state courts have historically regarded each other with wariness and suspicion. Many commentators reasonably fear that state courts will not give adequate consideration to tribal interests, and that tribes and their members are generally better off if disputes involving tribal matters are heard in tribal forums.¹¹

Yet while these arguments have some persuasive force, they fail to add up to a conclusive justification for keeping tribal law out of state court. To begin with, the arguments for restricting state-court application of tribal law are built on a jurisdictional landscape that has changed. As the Supreme Court has steadily limited tribal jurisdiction, it is no longer possible to assume that tribal courts have power to hear all cases involving substantial tribal contacts. Further, even where tribal courts have jurisdiction over individual claims, under certain circumstances state courts are more likely to have jurisdiction over an entire case.¹² It is likely, therefore, that many

⁸ See, e.g., Pub. L. No. 103-176, 107 Stat. 2004 (1993).

⁹ See John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction*, 21 Am. Indian L. Rev. 63, 91-92 (1997); Christine Zuni, *Strengthening What Remains*, 7 WTR Kan. J.L. & Pub. Pol'y 17 (1997) (describing the important cultural role of native languages in many tribal judicial proceedings).

¹⁰ Certain tribes, for example, use a mediation process designed to repair relationships between the parties rather than the traditional Anglo model in which an ostensibly neutral arbiter designates a winner and loser. See, e.g., John v. Baker, 30 P.3d 68, 76 (Alaska 2001) (describing Northway Tribe's "mediation-like" dispute resolution procedures).

¹¹ See Harte, *supra* note 9, at 91 (arguing that "[t]ribal courts, and tribal courts alone, should interpret tribal law, and a state court should enter a judgment of dismissal where a case involves the interpretation of tribal law").

¹² This is often the case when a tribe member wishes to sue a nonmember defendant. It is more widely true in P.L.

litigants make the reasonable choice to bring all possible claims in state court, rather than splitting them between state and tribal court. As a result of these developments, many cases that concern Indian litigants and arise in Indian country — cases that were once handled by tribal courts — now must be brought in state court if they are to be heard at all.

In consequence, state courts are increasingly confronted with cases that involve substantial tribal contacts, cases to which, under the choice-of-law principles followed by most states, tribal law would ordinarily apply. Because of concerns about the propriety of applying tribal law in state court, however, state-court judges may seek an alternative — such as concluding that the court lacks jurisdiction over all or part of a case¹³ or manipulating choice-of-law principles to the extent necessary to find that the case should be governed by state law.¹⁴

These results, while perhaps well-intentioned, often fail to serve the interests either of tribes or of individual litigants. As it is, restrictions on tribal jurisdiction have made state court the only available forum in many cases involving tribal matters. If state law rather than tribal law is applied to such cases, the already-narrowing sphere of tribal influence will only shrink further.

By contrast, the application of tribal law in such circumstances has the potential to promote

280 states, where state courts have concurrent jurisdiction over tribal matters but tribal courts do not have concomitant jurisdiction over cases traditionally heard by state courts.

¹³*See, e.g., Risse*, 585 N.W. at 879. Courts may also recast what is essentially a tribal-law issue as a jurisdictional issue. *See, e.g., Begay v. Roberts*, 807 P.2d 1111 (Ariz. App. 1990) (holding that the lower court, while possessing jurisdiction over the underlying case, had lacked jurisdiction to issue a writ of garnishment against a Navajo defendant's wages because Navajo law did not provide for such a remedy).

¹⁴*See Harrison v. Boyd Mississippi, Inc.*, 700 So. 2d 247, 249 (Miss. 1997) (stating, without elaboration, that state and tribal law on a given subject were identical and choice-of-law analysis hence unnecessary); *Warm Springs Forest Products Industries v. Employee Benefits Insurance Co.*, 300 Ore. 617 (1986) (finding that Oregon law applied to contract entered into by a tribal corporation); *Louis v. United States*, 54 F. Supp. 2d 1207, 1210 (D.N.M. 1999) (finding that, under federal statute, Congress likely intended state, rather than tribal, law to apply because of the “difficulty in proving the existence and substance of any tribal law”).

tribal autonomy and self-determination by providing a way in which tribal interests can be taken into account even where tribal courts lack jurisdiction over a case.

State-court application of choice-of-law principles in cases with tribal contacts also has the potential to benefit litigants. As current doctrine stands, the Supreme Court, acting under the assumption that state and tribal forums will each apply their own law, has devoted considerable attention to developing rules that determine whether a case involving tribal contacts should be heard in tribal court or state court. Because the way in which these rules should apply to any given case is often unclear, however, they can cause litigants considerable uncertainty. Further, these judicially crafted rules can often lead to illogical and inefficient results — as when, for example, they mandate that a given plaintiff’s claim must be heard in state court, while a defendant’s counterclaim must be heard in tribal court.¹⁵

Many of these problems could be avoided if the problem of allocating cases between state and tribal authority were regarded not merely as a forum-selection or jurisdictional problem, but also as a choice-of-law one. Forum-selection rules tend to dictate an all-or-nothing solution. Even if a case involves an equal mixture of state and tribal contacts, it ultimately must be brought *either* in state court or in tribal court. By contrast, choice-of-law doctrine is far more flexible and individualized. Unlike the decision whether to allow a claim to be heard in a particular forum, which generally must be made at the outset, choice-of-law decisions can be made on a case-by-case basis and in conjunction with a decision on the merits. A choice-of-law approach is

¹⁵ Under *Williams v. Lee*, 358 U.S. 217 (1959), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this could be the case if a member of a tribe asserted a claim against a nonmember in state court, and the nonmember wished to assert a counterclaim; it would also be the case if a tribe member wished to counterclaim against a nonmember who sued her in state court.

thus both more efficient from a litigant's point of view and more suited to a balanced accommodation of state and tribal interests.

Finally, there is little evidence that encouraging state courts to apply choice-of-law principles in the tribal context would create the practical difficulties that commentators have sometimes feared. Although the problems entailed in state-court interpretation of tribal law are real, they are also easy to overstate. It is true that the law of certain tribes may be difficult for outsiders to understand or apply. Many other tribes, however, rely to some degree on principles of Anglo-American jurisprudence familiar to state courts.¹⁶ Frequently, tribal codes look to state law as a model, and tribal courts may borrow state law where no tribal regulation exists.¹⁷ While the tribal law applied in these courts may not mirror exactly the law of any given state, the differences that exist are likely to be the sort of routine conflicts that state courts are accustomed to negotiating: whether to apply a tribal ordinance allowing for unlimited punitive damages where state law imposes a cap,¹⁸ or whether or not a creditor must make use of judicial process before repossessing property.¹⁹ In cases such as these, where there is little possibility for misunderstanding, it is likely that many tribes will accept and, in fact, welcome the broader application of their laws. Further, in cases where tribes do not wish to have their law applied by outsiders, choice-of-law theory is flexible enough to take such preferences into account, thus minimizing the risk of undermining tribal authority.

¹⁶ For a discussion of some ways in which tribal courts integrate traditional and Anglo practices, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. Rev. 225, 250-55 (1994). See also Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9-SUM Kan. J.L. & Pub. Pol'y 761 (2000), for a fascinating account of how Hopi judges are attempting to develop Hopi law "to ensure a tight fit between Western justice models and persisting Hopi ways."

¹⁷ See William C. Canby Jr., *AMERICAN INDIAN LAW* 214 (1998).

¹⁸ See, e.g., *Cheromiah v. United States* 55 F. Supp. 2d 1295 (D.N.M. 1999).

¹⁹ See, e.g., *Tempest Recovery Services v. Belone*, 74 P.3d 67 (N.M. 2003).

This article proceeds in three parts. Part I reviews in turn the two principal strands of Indian law doctrine, as reflected in Supreme Court cases: first, cases that attempt to foster tribal autonomy; second, cases that impose strict limits on tribal regulatory and adjudicative power over nonmembers. Part I then outlines two serious problems with the current state of the law: first, that the complex and highly fact-bound set of jurisdictional rules the Court has developed leads to uncertainty and inefficiency in choice of forum; and second, that the Court's decisions have given insufficient weight to tribal interests.

Part II examines the possibility that wider application of tribal law in state court could help to address these concerns by reducing the jurisdictional friction between states and tribes and permitting tribal interests to be taken into account more fully. Part II first sets forth the argument that, under prevailing choice-of-law principles, tribal law should be applied more broadly in state court than it generally has been. It explores the way in which choice-of-law concepts can be adapted to the distinctive features of tribal sovereignty, and discusses why such an approach would have advantages over the current one.

Part III discusses potential objections to the application of tribal law by state courts: first, that it might raise due process concerns; second, that it might be preempted by federal Indian law; third, that application of tribal law will inevitably undermine tribal autonomy. Rejecting these arguments, this article ultimately concludes that state-court application of tribal law will help state courts to handle cases with tribal contacts in a way that is fairer and more straightforward — an outcome that will ultimately work to the advantage of both litigants and tribes.

I. A Thicket of Rules: Tribal-State Case Allocation Under Current Law

While a detailed set of rules governs the allocation of cases between state and tribe courts, these rules are not the product of a comprehensive body of doctrine or statutory scheme. Instead, most of the principles that determine whether a case should be brought in state or tribal court are the result of judicially formulated, fact-specific solutions to the problems presented by individual cases. Taken as a whole, these forum-selection rules often, perhaps unsurprisingly, lead to illogical or unexpected results.

The seeming chaos of the Supreme Court's case law is in part the product of the two central principles by which the Court has been guided, which have often pointed in conflicting directions. On the one hand, the Court has sought to protect tribes' right to govern autonomously, free from state interference. As a result, the Court has sought to ensure that tribal courts retain exclusive jurisdiction over the cases that seem most likely to implicate core tribal interests, and to protect tribal courts, like other instruments of tribal self-governance, from sometimes-hostile state policies.²⁰ Further, the Court has often resisted Congress's efforts to promote assimilation at the expense of tribal authority — through, for example, the Court's decision to adopt a narrow construction of P.L. 280, a federal statute that gives a handful of states concurrent jurisdiction over tribal disputes.²¹

²⁰ In the nineteenth century and parts of the twentieth, the Court often acted as a lone — if inconsistent and inescapably colonialist — champion of tribal interests that have often been encroached upon by state governments and ignored in national electoral politics. For an extensive discussion of the Court's present and historical role, see Philip Frickey, *(Native) American Exceptionalism in American Public Law*, 119 Harv. L. Rev. 431 (2005). More recently, Congress and the Bureau of Indian affairs have become more sympathetic to the goal of tribal autonomy, and the Supreme Court's pro-sovereignty decisions have had the effect of furthering legislative and executive policy rather than hindering it.

²¹ See *Bryan v. Itasca Country*, 426 U.S. 373, 388 (1976) (discussed more fully *infra* at Part IIIB).

At the same time that it has sought to protect tribal institutions, however, the Court has also at times looked at those institutions with suspicion. Tribal governing bodies and tribal courts are not subject to the constraints of the Constitution,²² and perhaps in consequence, the Court has been reluctant to allow them to assert authority over those who are not voting, participating members of the tribe. While insisting that tribes are more than “voluntary organizations,”²³ the Court has nonetheless sharply constrained tribes’ ability to govern those who have not taken affirmative steps to associate themselves with the tribe.²⁴ Under current law, therefore, nonmembers who stand in no special relationship to tribes generally will not be subject to tribal law and cannot be haled into tribal court against their will.

As it has sought to promote these two often-conflicting goals, the Court has mostly sought to regulate the allocation of cases involving tribal contacts through one primary method: by assigning a case either to state court, where state law will presumptively apply, or to tribal court, where it will likely be governed by tribal law. Further, the Court has developed such procedural mandates on a case-by-case basis, considering only rarely — if at all — how they interact as a whole. Therefore, like the contradictory aims they are designed to serve, the case-allocation rules the Court has developed often pull in two directions. For example, while the Supreme Court has, on the one hand, emphasized the centrality of tribal courts to tribal sovereignty, it has also severely undermined the power of tribal courts to hear disputes that have a significant effect on tribes’ well-being. Moreover, the current rules of forum allocation protect

²²See *Talton v. Mayes*, 163 U.S. 376 (1896).

²³ See *Duro v. Reina*, 495 U.S. 676, 688 (1990) (“The tribes are, to be sure, a good deal more than private voluntary organizations, and are aptly described as unique aggregations possessing attributes of sovereignty over both their members and their territory.”) (internal citations and quotation marks omitted).

²⁴ See Canby, *supra* note 17, at 112 (noting Supreme Court’s recent focus on tribe membership).

certain litigants' interests while ignoring others. Indian defendants, for example, are shielded from being sued in a state forum, while Indian plaintiffs are severely hampered in their ability to sue nontribal defendants in a forum of their choice.

This section considers these developments and their effects. It starts by setting forth a brief history of tribal sovereignty and the relationship between tribal and state courts. It then considers in turn the two main approaches to tribal sovereignty the Supreme Court has pursued and the concrete procedural rules those policies have created. Throughout, this section seeks to demonstrate the problems inherent in the single, problematic method — assigning jurisdiction over particular types of cases to either a state or a tribal forum — by which the Court has defined and enforced the respective limits on state and tribal sovereignty.

A. Historical Background: Tribal Autonomy and Geographic Fragmentation

For a variety of historical reasons, unique problems exist in allocating cases between state and tribal courts and in translating choice-of-law principles to the tribal context. Because of various efforts by the federal government to transfer tribal trust land to private owners, the geographical reach of a tribe's political control is often uncertain. Similarly, the degree of sovereignty tribes have been thought to possess in relationship to states and the federal government has shifted over time, and remains unclear today. This section sketches forth some of the historical background necessary for an understanding of the current state of the law.

Only fairly recently have procedures for allocating cases between state and tribal court have become necessary. For most of the nation's history, tribal judicial systems, where they existed at all, functioned with almost complete autonomy. Until the end of the nineteenth century, tribes performed the task of keeping order on their lands themselves, using both formal

and informal judicial processes,²⁵ and state and federal courts were frequently willing to recognize and enforce the judgments of tribal courts.²⁶ (By contrast, only a minority of states today extends automatic or near-automatic recognition to tribal judgments.²⁷) While federal courts sometimes intervened to protect tribes against hostile state governments,²⁸ tribes and states had little formal interaction. In fact, only in 1924 did Indians living on a reservation become recognized as citizens of the surrounding state as well as members of a tribe.²⁹

By the late nineteenth century, however, the federal government had become increasingly interested in weakening the power of tribes and assimilating Indians into Anglo-American culture.³⁰ To handle tribal civil controversies, the federal government began to

²⁵ See Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law*, 80 Marq. L. Rev. 531, 547-48 (1997); Zuni, *supra* note 9 (arguing that prior to the end of treaty-making with tribes in 1871, “the federal policy was one of respect for tribal self-government and traditional forms of tribal justice.”).

²⁶ In *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100, 102 (1855), the Supreme Court held a tribal court probate order was entitled to be enforced by District of Columbia courts, on the basis that the tribe was included in the definition of a “territory” under the relevant federal probate statute. See also Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311, 320 (2000), at 320 (noting that, while some question was considered to exist about whether recognition of tribal judgments was required by the constitutional Full Faith and Credit Clause or its implementing statute, 28 U.S.C. § 1738, which specifically encompasses “territories,” in practice many lower courts automatically gave full faith and credit to tribal judgments).

²⁷ Despite early precedent suggesting that tribal judgments are entitled to full faith and credit, see Robert Laurence, *The Role, If Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State, and Tribal Money Judgments*, 35 Tulsa L. J. 1, 16-17 (1999), the majority of state courts today have concluded that the constitutional Full Faith and Credit clause and its implementing statute, 28 U.S.C. § 1738, do not command state-court recognitions of tribal judgments. While few states, such as New Mexico, take the opposite view, finding that tribal lands are included in the statute’s reference to “territories,” see Leeds, *supra* note 26, at 332, most state courts grant a measure of deference to tribal judgments that falls well short of the automatic recognition they must accord sister-state judgments under 28 U.S.C. § 1738. See Canby, *supra* note 17, at 213.

²⁸ See, most famously, *Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁹ Canby, *supra* note 17, at 23. In 1924, the Indian Citizenship Act granted Indians federal citizenship; through the Fourteenth Amendment, Indians thus also became citizens of the state in which they resided. See *id.*

³⁰ The practice of allowing tribes autonomy in handling their legal affairs became particularly controversial following a well-publicized 1883 case in which the Court held that no jurisdiction existed in federal court over a murder of one Indian by another. See *Ex parte Crow Dog*, 109 U.S. 556 (1883). In response to public perception that tribal justice was inadequate in cases of violent crime, see Canby, *supra* note 17, at 19-20, Congress passed the Major Crimes Act, which granted federal courts jurisdiction over a variety of serious crimes in Indian country, including those in which the perpetrator and victim were both Indians. See 18 U.S.C. § 1153(a).

establish Courts of Indian Affairs, which applied federal common law rather than tribal law.³¹ In addition, in 1887 Congress enacted the General Allotment Act,³² which authorized grants of reservation land to individual Indians, to be held in trust by the federal government for a period of time before passing into private ownership.³³ Among other significant provisions, the Act allowed any remaining reservation land to be made available to non-Indians; in addition, it made Indian allottees subject to state law.³⁴

While allotment was applied to different reservations to varying degrees, the substantial majority of reservation land was ultimately allotted, and much of the allotted land was ultimately sold to non-Indians.³⁵ By creating a checkerboard pattern of ownership, the effects of allotment added an element of uncertainty to tribal jurisdiction and strengthened the arguments of those who believed that state courts and state law should have a role in Indian country.³⁶ As will be subsequently discussed, the checkerboard pattern thus created resulted in lasting uncertainty about the territorial reach of any given tribe's power.

In recognition of the difficulties allotment had caused, federal policy in the 1930s shifted in a radically different direction. Federal officials began to recognize the virtues of tribal autonomy — not just as a default state of affairs, but as a goal towards which to strive. The Indian Reorganization Act of 1934³⁷ returned some unallotted land to tribal control and provided

³¹ Canby, *supra* note 17, at 19.

³² See 24 Stat. 388.

³³ Canby, *supra* note 17, at 21.

³⁴ *Id.*

³⁵ *Id.* at 22 (noting that Indian-held land declined from 138 to 48 million acres from 1887 to 1984).

³⁶ See Phillip Allen White, *The Tribal Exhaustion Doctrine*, 22 Am. Ind. L. Rev. 65, 75 n.31 (1997) (“[A]s non-Indians moved onto reservations, so too did state law.”)

³⁷ 25 U.S.C. § 461 et seq.

a structure by which tribes could register constitutions with the federal government.³⁸ Many tribes formalized their structures of governance in written constitutions and re-established their defunct tribal courts.³⁹ Nonetheless, because allotment had eroded the geographical integrity of reservations, the revived tribal courts were thus unable to function with anything like the autonomy their nineteenth-century counterparts had enjoyed.⁴⁰

By the 1950s, assimilationism had come back into vogue, this time in the form of the policy known as “termination,” which was designed to do away with tribes as political entities and with reservations as distinctively Indian land.⁴¹ In many cases, tribes were dissolved, tribal lands were sold, and individual Indians were encouraged to relocate to non-Indian areas.⁴² Further, in contrast to the program of allotment, states — as opposed to the federal government — became a primary instrument of weakening tribal political power. Thus, as part of the assimilation process, Congress granted certain states broad jurisdiction to decide disputes in Indian country.⁴³ Shortly thereafter, Congress provided a more comprehensive grant of jurisdiction in the form of Public Law 280,⁴⁴ which gave five states (California, Minnesota, Nebraska, Oregon, and Washington, with a sixth jurisdiction — the then-territory of Alaska — added in 1958) extensive criminal and civil adjudicatory authority over reservations.⁴⁵

³⁸ See Canby, *supra* note 17, at 24.

³⁹ See Leeds, *supra* note 26, at 324; Zuni, *supra* note 9.

⁴⁰ See Canby, *supra* note 17, at 24 (describing the post-allotment era as “a marked change from [earlier times], when reservations were fairly homogeneous territories with clearly defined boundaries and where most non-Indians were present expressly to engage in some form of intercourse with the Indian inhabitants”).

⁴¹ *Id.* at 25-26.

⁴² *Id.* at 26-27.

⁴³ See Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State*, 27 Harv. J. on Legis. 497, 540-41.

⁴⁴ See Canby, *supra* note 17, at 219. As discussed *infra* at Part IIIB, the Court in *Bryan*, 426 U.S. at 373, gave the civil-jurisdiction provisions of P.L. 280 a fairly restrictive interpretation.

⁴⁵ *Id.* A few Indian reservations within the affected states were exempted from P.L. 280’s coverage either in the original statute or through later-added retrocession provisions.

Like allotment, termination was ultimately recognized as a failure — a policy that disrupted the fabric of tribal life while failing to integrate tribe members, either economically or culturally, into non-Indian society.⁴⁶ Starting in the Nixon administration, the federal government began to shift back toward autonomy-promoting policies — an ideology that has remained more or less in place to the present day.⁴⁷

At various points, therefore, the federal government has embraced two essentially opposite goals⁴⁸ — assimilationism and tribal autonomy — and tribal institutions have been influenced not only by these conflicting policies but by the way in which the federal government has swung back and forth between them. In periods when the federal government adopted pro-autonomy policies, it did so in large part by encouraging the development of tribal law and tribal institutions, including tribal courts. By contrast, the federal government has primarily implemented assimilationist policies in two ways — first, by disrupting the geographical integrity of Indian reservations, and second, by increasing the role of states in Indian life. Thus these two sets of policies, designed to achieve opposite ends, have resulted in an unintended hybrid: reservations that often have strong tribal institutions, including courts, but that are geographically fragmented,⁴⁹ and that share regulatory power, sometimes uneasily, with states.⁵⁰

⁴⁶ See Canby, *supra* note 17, at 29.

⁴⁷ *Id.*

⁴⁸ The approach of the political branches can be compared to that of the Supreme Court, which — as the following section argues — has vacillated over time between strong concern for the rights of tribes on the one hand and fears about abuses of tribal power on the other. The Court and the political branches have not, however, always embraced the same trends at the same time; for example, the Court decided *Williams v. Lee*, a case that strongly embraces tribal autonomy, at a time when Congress was still flirting with assimilationism.

⁴⁹ There are, of course, a multitude of reasons why the identity of tribes may not be as strongly grounded in geography as that of other political entities may be. Most obviously, tribes may have lost, through treaties or forced relocations, land they originally inhabited land or that has political or cultural significance to the tribe. Congressional policies of allotment and termination, however, have also played a significant role. See Canby, *supra* note 17, at 22-25.

⁵⁰ See Canby, *supra* note 17, at 270-76 (discussing extent of state regulatory power in Indian country).

Thus, as a result of various federal policies, tribes have some common characteristics of other sovereigns, including, for example, courts, political institutions, and sovereign immunity,⁵¹ while lacking others, such as political authority within their borders that operates irrespective of the ownership of individual parcels of land. As the following section argues, this particular set of characteristics has shaped the way in which the Supreme Court has developed what I will call, for lack of a better term, its jurisprudence of case allocation.⁵² In other words, the Court has at various times treated tribes like sovereigns; it has sought to protect tribal courts from state interference and, in particular, to prevent states from asserting jurisdiction over sensitive tribal issues.⁵³ At the same time, the Court has also refused to assume that tribes have all the usual characteristics of sovereigns; it has, for example, held that tribal courts are not courts of general jurisdiction⁵⁴ and that — in striking contrast to state courts — their jurisdiction is only as broad as the tribe’s underlying regulatory power.⁵⁵

While these two judicial goals in themselves often point in different directions, the problem is compounded by the fact that reservations themselves are often fragmented, encompassing at least three different categories of land: land owned by tribe members, land owned by non-Indians or Indians who are not members of the tribe, and tribal trust land.⁵⁶ Because these various types of land are subject to varying degrees of tribal influence and control,

⁵¹ See *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (reaffirming the doctrine of tribal sovereign immunity).

⁵² This term is designed to encompass a few separate concepts: the question of whether a case implicating Indian affairs should be brought in state or tribal court; the question of whether state or tribal law should apply to such a case; and the question of which decisionmaker should determine the preceding two issues.

⁵³ See *Williams v. Lee*, 358 U.S. 217 (1959) (holding that non-Indians cannot sue Indians in state court for disputes centered on the reservation); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (reaffirming that tribes enjoy immunity from suit even for off-reservation activities).

⁵⁴ See *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

⁵⁵ *Id.* at 357-58.

there is no obvious territorial marker of tribal authority. Further, pockets of land outside Indian reservations, including “all dependent communities within the borders of the United States” and all allotted land with existing Indian title, also qualify as “Indian country” by federal statute.⁵⁷ Therefore, though the geographical boundaries of the reservation may be clear, the geographical reach of the tribe’s power is far less so.⁵⁸ Thus, a largely unintended byproduct of the aborted assimilationist program has been to increase the gray areas in which both states and tribes can plausibly claim jurisdiction.

B. Conflicting Rules: The Supreme Court and Case Allocation

The second part of this section considers in turn the two faces of the Supreme Court in Indian jurisdiction cases: first as a protector of tribal autonomy, and second as an enforcer of limits on tribal power. It argues that the Court, in both roles, has used rules establishing which forum can or must hear a case as its primary means of implementing policy.

1. From *Williams* to *Wold*: Tribal Autonomy as Procedural Rule

Over the past few decades, the Supreme Court has, in a few landmark cases, announced a set of procedural rules designed to protect tribal autonomy. This section considers those key cases and the ways in which they reflect differing views about the role of state courts in tribal affairs.

a. *Williams v. Lee*

In the 1958 case of *Williams v. Lee*,⁵⁹ the Court established a jurisdictional principle that ensured that Indian defendants would not be required to defend themselves against non-

⁵⁶ Canby, *supra* note 17, at 114.

⁵⁷ 18 U.S.C. § 1151; see also Canby, *supra* note 17, at 114.

⁵⁸ See, e.g., *Brendale v. Confederated Yakima Nation*, 492 US 408 (1989) (discussed *infra* at note 201).

Indians in possibly hostile state courts. Reversing the Arizona state courts, the Supreme Court held that a non-Indian proprietor of a general store on the Navajo Indian Reservation who wished to sue a Navajo couple for unpaid debts was obliged to do so in tribal court. Further, the Court established a famous test for determining whether a given state assertion of jurisdiction over Indian country was legitimate: “whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”⁶⁰

Williams v. Lee had a powerful philosophical influence on lower courts.⁶¹ The Court’s succinct definition of tribal sovereignty as “the right of reservation Indians to make their own laws and be ruled by them” is perhaps the most widely quoted phrase in the Indian-law canon.⁶² Beyond *Williams*’s strong defense of tribal autonomy, however, the case can also be interpreted as setting forth two subsidiary principles.

First, although *Williams*’s holding was framed in terms of broad principles of tribal sovereignty, *Williams*’s most immediate effect was to establish a fairly rigid procedural rule: if a non-Indian sues an Indian in a case arising in Indian country, that case must be heard in tribal court.⁶³ While, as the Court recognized, such a rule provides a great deal of protection to tribes and tribal defendants, it also presents certain practical difficulties. First, the rule assumes that the identities of plaintiff and defendant remain stable in any given case. Often, however, this will not be so. In certain cases — such as a complex contract dispute — it may not initially be clear

⁵⁹ 358 U.S. 217 (1958).

⁶⁰ *Id.* at 219-20.

⁶¹ See, e.g., *Tempest Recovery Services v. Belone*, 2003 N.M.19 (2003).

⁶² Laurie Reynolds has described this portion of the opinion as “one of the most frequently cited passages in federal Indian law.” See Reynolds, *supra* note 6, at 595.

⁶³ As Reynolds notes, “[p]erhaps because of the ambiguous analytical basis of the holdings, state courts have seized upon the specific facts of [*Williams*] rather than struggle to apply vague notions about the infringement of tribal sovereignty or federal preemption to determine the limits of state court adjudicatory power.” Reynolds, *supra* note 6,

who is liable to whom, and both parties may believe themselves to be aggrieved. In such cases, which party becomes the plaintiff and which the defendant may be determined simply by who files suit first. Similarly, someone who is sued and then brings a counterclaim may be both plaintiff and defendant in the same action.⁶⁴ Moreover, the rule of *Williams* assumes that a tribal court will always be available to hear a dispute. This is not always the case, not only because some tribes are too small or poor to maintain judicial systems,⁶⁵ but because a tribal court is under no obligation to exercise the full extent of its jurisdiction; many tribes, for example, limit access to their courts to tribe members.⁶⁶

A more substantive effect of *Williams*, however, may have been to foster the perception that, in order for tribes to enjoy the right to “be ruled by” their own laws, such laws must be enforced in tribal court. Of course, on the facts of *Williams* itself, few would disagree that application of Arizona law to the tribal defendants — presumably what would have occurred had the plaintiffs been allowed to proceed in state court — would have undermined Navajo self-rule by substituting another sovereign’s laws as the decisional law in the case. The Court, however, went further, suggesting that the mere “exercise of state jurisdiction” would “undermine the authority of the tribal courts over Reservation affairs.”⁶⁷ *Williams* therefore firmly established the idea that tribal adjudication, not application of tribal law, was the primary device by which tribal sovereignty could be furthered.

at 546-47.

⁶⁴ See *Wold v. Three Affiliated Tribes of the Fort Berthold Reservation*, 476 U.S. 877, 891 (1986) (recognizing problem created by counterclaim asserted against Indian who had sued non-Indian in North Dakota court).

⁶⁵ While some tribes have well-developed judicial systems, others still rely on “very informal single-judge courts operated on a part-time basis without supplementary services.” See Canby, *supra* note 17, at 64.

⁶⁶ Reynolds, *supra* note 6, at 577 (noting that many tribes follow model ordinance originally provided by the Department of the Interior, which did not provide for jurisdiction over nonmembers).

⁶⁷ 358 U.S. at 223.

This principle carried the potential for some unfairness to individuals, since a strict application of *Williams* could have the effect of leaving certain plaintiffs without a remedy in situations where tribal court was unavailable. A more subtle and more important effect of *Williams*, however, may have been to encourage state courts to think of tribal autonomy only in terms of tribal adjudication. In other words, once a state court has satisfied itself that an assertion of jurisdiction over a given case would comport with *Williams*'s requirements — either because the defendant is non-Indian or because substantial parts of the transaction occurred off the reservation — it may conclude that it has done all that is necessary to respect tribes' rights to “make their own laws and be ruled by them.”⁶⁸

None of this is to slight the importance of *Williams*, which remains a landmark case for tribal autonomy and an important guarantee of tribal rights. Yet while the principles underlying *Williams* remain vital, the specific jurisdictional rule the Court chose to implement those principles is perhaps in some ways outdated, and its rigidity may constrain state courts in ways that are not always beneficial to tribes.

b. Fostering Tribal-Court Control Over Tribal Disputes: *Fisher v. District Court*

In *Fisher v. District Court*,⁶⁹ a case involving a tribe member's efforts to adopt a child who was also the subject of a tribal custody dispute, the Court reinforced and extended the central principle of *Williams* by suggesting that state courts lack jurisdiction against all Indian defendants, even in situations where the plaintiff is also Indian. Noting that state jurisdiction

⁶⁸ As Reynolds notes, state courts often give *Williams* its narrowest possible scope, “refus[ing] to adjudicate disputes involving Indians or reservation affairs only if the defendant is an Indian and if the transaction involves no substantial off-reservation contacts. That is, state courts generally assert jurisdiction over suits brought against a non-Indian defendant even if the transaction arose in Indian country; similarly, many cases hold that state court adjudication is proper in lawsuits filed against an Indian defendant if the facts reveal substantial off-reservation

over a dispute among Indians was required to meet “at least” the standard set by *Williams*,⁷⁰ the Court found that to allow the state to assume jurisdiction in this case would be to “subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves.”⁷¹

From the standpoint of promoting tribal autonomy and avoiding interference with tribal courts’ decision-making powers, the Court’s decision was abundantly justified. Many commentators had urged that states not be permitted to interfere with Indian custody disputes among Indians on the grounds that they were core matters of tribal identity.⁷² Further, in this case, the risk that the tribal court’s authority would be undermined by a conflicting state adjudication was a real one: The plaintiff had turned to Montana court while a related custody proceeding was pending in tribal court, and in defiance of the tribal court’s holding that it had exclusive jurisdiction over the case.⁷³

Nonetheless, the Court’s opinion appeared to rest in part on the idea that, even had these additional factors not been present, state-court jurisdiction would undermine the “right of the Northern Cheyenne Tribe to govern itself independently of state law.”⁷⁴ As in *Williams*, therefore, the Court apparently assumed both that state courts would apply state law and that state-court adjudication of suits against Indian defendants would inevitably undermine tribal

contacts.” See Reynolds, *supra* note 6, at 547.

⁶⁹ 424 U.S. 382, 386 (1976).

⁷⁰ *Id.* at 386.

⁷¹ *Id.* at 387-88.

⁷² Indeed, just two years after *Fisher* was decided, Congress passed the Indian Child Welfare Act, which grants tribes exclusive jurisdiction over child custody matters unless they are in a P.L. 280 state.

⁷³ In an unusual procedure, the Montana trial court certified the question of its jurisdiction to the Northern Cheyenne Tribe, which found that the tribe possessed exclusive jurisdiction. 424 U.S. at 384. Although the Montana trial court then dismissed the case for lack of jurisdiction, the Montana Supreme Court overturned this ruling. *Id.* at 384-85.

authority.

Further, going beyond *Williams*, the Court indicated that the need to allow tribal courts to decide tribal disputes should override the preferences of individual Indians. Responding to the argument that a bar on state-court access would be unfair to Indian plaintiffs, the *Fisher* Court found that “even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”⁷⁵ Thus, the Court suggested, the decision to deny individual Indian plaintiffs access to state court was in the best interests of Indians as a whole. The Court’s reasoning is particularly surprising given the existence of a seemingly far more plausible (and less paternalistic) justification for the result in *Fisher* — that concern for the rights of tribal *defendants* required that the claims asserted against them be decided in tribal forums and/or according to tribal law.⁷⁶

Thus, *Fisher* in essence replicated some of the problems created by *Williams* — adopting a wholesale procedural rule as a way of handling complex issues of tribal autonomy, and articulating an unnecessarily constricted view of the scope of tribal interests. In particular, the Court failed to differentiate between the interests of individual Indian litigants from the interest of the tribe as a whole — and, in consequence, failed to explain convincingly why it had chosen to favor the latter at the possible expense of the former. Therefore, although — as had been the

⁷⁴ *Id.* at 386.

⁷⁵ *Id.* at 390-91.

⁷⁶ In *Strate*, 520 U.S. at 459, for example, the Court expressed concerns about requiring non-Indians to defend “commonplace state highway accident claim in an unfamiliar [i.e., tribal] court.” Presumably the same logic should militate against requiring Indians to defend against lawsuits in unfamiliar state courts.

case in *Williams* — the result in *Fisher* was entirely sensible and justified, *Fisher*’s simple hands-off rule may have been at once too rigid and too narrow a way of understanding how state courts should take into account tribal interests in litigation that might come before them.

c. Ensuring Access: The *Wold* Cases

Where *Williams* addressed the consequences of a suit by a non-Indian against an Indian, *Wold I*⁷⁷ and *Wold II*⁷⁸ concerned the opposite situation: the degree to which state courts were obliged to provide access to Indian plaintiffs suing non-Indian defendants.⁷⁹ In the *Wold* cases, the Supreme Court considered whether North Dakota could lawfully place conditions on tribes’ access to courts, and concluded that it could not.

The *Wold* cases arose out of the following situation. North Dakota courts had historically asserted jurisdiction over Indian country in cases not involving Indian land interests. After P.L. 280 was passed, North Dakota courts interpreted the law as confirming jurisdiction they already possessed. In 1963, in accordance with amendments to P.L. 280 permitting new assumptions of jurisdiction with tribal consent, the North Dakota legislature enacted a new statute, Chapter 27-19, which provided that “jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter.”⁸⁰ Chapter 27-19 further provided that, upon such acceptance, “civil laws of this state that are of general application to private property” would also apply in

⁷⁷ Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering (“Wold I”), 467 U.S. 138 (1984).

⁷⁸ Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering (“Wold II”), 476 U.S. 877 (1986).

⁷⁹ See *Wold I*, 467 U.S. at 140 (noting that the case was “somewhat unusual in a central respect” because “the Tribe seeks, rather than contests, state-court jurisdiction, and the non-Indian party is in opposition”). Although it is actually unclear how far *Wold I* and *Wold II*’s holdings extend, they have generally been interpreted by state courts to mandate access for Indians who wish to sue non-Indians in state courts. See Reynolds, *supra* note 6, at 553.

⁸⁰ *Wold II* at 476 U.S. at 880 (quoting N.D. Cent. Code § 27-19-01 (Supp. 1985)).

Indian country.⁸¹

Subsequently, the Three Affiliated Tribes sued Wold Engineering in state court for negligence and breach of contract in connection with Wold's construction of a water supply system on the reservation.⁸² Wold counterclaimed for the Three Tribes' alleged failure to make payments. The North Dakota courts dismissed the claim for lack of jurisdiction, holding that when Chapter 27-19 instituted a tribal consent requirement, it disclaimed all jurisdiction the state had previously possessed.⁸³

The Supreme Court reversed, in a decision that has been taken to hold that that state courts must remain open for Indians who wish to bring suit there.⁸⁴ The Court found that Chapter 27-19 was preempted insofar as it attempted to "disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum" if tribes did not consent to the state's conditions.⁸⁵ In so holding, the court relied on the "important backdrop" provided by "considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy,"⁸⁶ finding that "the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests."⁸⁷

The Court drew a sharp contrast between this situation and that of *Williams*, finding that "tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian

⁸¹ *Wold II* at 476 U.S. at 880 (quoting N.D. Cent. Code § 27-19-01 (Supp. 1985)).

⁸² *Id.* at 881.

⁸³ *Id.*

⁸⁴ See Reynolds, *supra* note 6, at 553 (noting that, while the result in *Wold* rested on narrow preemption grounds, state courts have interpreted the decision broadly).

⁸⁵ *Wold II*, 476 U.S. at 883.

⁸⁶ *Id.* at 884.

⁸⁷ *Id.* at 888.

country.”⁸⁸ Indeed, as the Court pointed out, Indians would often have no judicial recourse in the absence of such state jurisdiction, since even if plaintiffs were able to secure tribal judgments they would be unable to enforce them in state court.⁸⁹

This time, instead of emphasizing the importance of a tribal forum, the Court instead focused on the displacement of tribal law. The Court expressed skepticism about Chapter 27-19’s requirement that, in order to gain access to state courts, tribes would have to agree that state law would generally apply to claims by Indian plaintiffs. This possibility, the Court found, was a “potentially severe intrusion on the Indians’ ability to govern themselves according to their own laws” that “simply [could not] be reconciled with Congress’ jealous regard for Indian self-governance.”⁹⁰

Wold I and *II* thus cast doubt on *Williams*’s implicit equation of tribal-court jurisdiction with tribal independence. Instead, the *Wold* cases suggest that adequate respect for tribal sovereignty hinges not on whether a case is heard in a state or tribal forum, but whether it is decided according to state or tribal law.⁹¹ Indeed, through its rejection of the state-law-mandating condition North Dakota attempted to impose, *Wold II* can even be read to imply that under some circumstances, state courts might be *required* to choose tribal law.

At the same time, however, the *Wold* cases fail to explore the implications of some of these more sweeping statements, neglecting to consider the relationship between the regime they establish and the policy in favor of tribal adjudication that *Williams* reflects. Moreover, as is also

⁸⁸ *Wold I*, 467 U.S. at 149; see also *Wold II*, 476 U.S. at 888.

⁸⁹ *Id.* at 892. Although Chapter 27-19 granted access to tribes that fulfilled the state’s conditions, the Court found these conditions to be “an unacceptably high price to tribal sovereignty” that would “operate to effectively bar the Tribe from the courts.” *Id.* at 889.

⁹⁰ *Id.*

arguably the case with *Williams*, the ringing endorsements of tribal autonomy found in *Wold I* and *II* can essentially be boiled down to a procedural rule: in this case, that Indian plaintiffs must be allowed to sue non-Indian defendants in state court.

As well as being disappointingly limited, this holding is also problematic, particularly when set against *Williams*. Under the everything-not-compulsory-is-forbidden regime that *Williams* and *Wold I* and *II* set up, state courts may not assert jurisdiction in situations where the defendant is an Indian and the plaintiff non-Indian; in the reverse situation, however, they may not *decline* jurisdiction. As discussed earlier, this rule places a strong emphasis on the *form* of a lawsuit, creating a conundrum for courts — and for litigants — in cases in which both parties have asserted claims against the other. The *Wold II* Court recognized this issue but set it aside, declining to address the problem of how counterclaims should be handled.⁹²

Williams, *Fisher*, and the *Wold* cases show how the Court's philosophy of how cases should be allocated between state and tribal court may be fraught with tensions and contradictions even when the Court is acting in service of a single goal — protecting tribal sovereignty. Further, these cases illustrate how the Court has focused exclusively on creating rules about the forum in which a case may or must be brought as a way of achieving that goal, while giving inadequate attention to the overall procedural regime its decisions create. Finally, even as its decisions, particularly *Wold II*, suggest that choice of law is a significant part of the picture, the Court has not framed the holdings of its cases in choice-of-law terms, and it has provided little guidance or analysis to courts deciding which law to apply.

⁹¹ *Id.* at 890.

⁹² *Wold II*, 476 U.S. at 891 (declining to decide the question of “[t]he extent to which respondent's counterclaim may be used not only to defeat or reduce petitioner's recovery, but also to fix the Tribe's affirmative liability has been the

The Court’s silence is particularly striking given that application of tribal law under choice-of-law principles would represent one way to reconcile *Williams* and *Fisher* with *Wold I* and *II*. In both *Williams* and *Wold*, a principal threat to tribal sovereignty was that a tribe, or one of its members, would be confronted with the possibility of having state law applied to tribal disputes — in *Williams* because the state court would likely have applied Arizona law to an on-reservation transaction, in *Wold I* and *II* because North Dakota attempted to condition tribal access to state courts on the promise to accept the application of state law. By focusing exclusively on the court in which a dispute was to be heard rather than the law to be applied, however, the Court obscured these differences.

2. The Road to *Hicks*: Expanding state courts’ role in adjudicating tribal disputes

The Court’s cases affirming tribal sovereignty represent only one facet of the Court’s case-allocation regime. The following section explores the Court’s decisions that serve a distinct, and sometimes opposite goal — shielding tribal nonmembers from unfamiliar tribal courts — and looks at the further procedural tangles they have created.

In the past two decades, the Court has substantially narrowed tribes’ ability to regulate the conduct of nonmembers and impeded the ability of tribal courts to decide cases involving nonmembers. Under current law, a person over whom the tribe lacks regulatory jurisdiction — a category that includes almost all nonmembers — cannot be haled into tribal court.⁹³

subject of some discussion in this case”).

⁹³ The Court has not applied this reasoning to state courts and state law; that is, while the Court has sometimes assumed that state jurisdiction over reservation matters has the inherent potential to undermine tribal sovereignty, the Court has never suggested that the jurisdictional reach of state courts over tribe members is equivalent to the legislative authority states can exert on the reservation. In fact, in *Bryan*, the Court held precisely the opposite: that a grant of adjudicative jurisdiction to state courts did not in itself imply the authority to regulate on-reservation conduct. *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) (opining that “if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it

This principle, an unusual approach to adjudicative jurisdiction,⁹⁴ has brought into existence another complex jurisdictional inquiry in cases involving tribal interests. In contrast to the several independent rules that govern whether state courts may (or must) hear suits involving tribal contacts, the existence of tribal-court jurisdiction hinges on a test initially set forth in a single case, *Montana*. Nonetheless, the question of tribal jurisdiction is far from straightforward because the *Montana* test is a complicated one to apply. Thus, unlike the limits on state-court adjudication of tribal cases — the application of which is relatively simple — the boundaries of tribal courts’ jurisdiction are often uncertain.

As the preceding section has described, state-court jurisdiction is based on litigant identity. The existence of jurisdiction, or the lack thereof, is clear once it has been established whether the plaintiff and the defendant are Indian or non-Indian.⁹⁵ Where tribal-court jurisdiction is concerned, however, identity is only one piece of the puzzle. Tribal courts normally have jurisdiction over members of the tribe for on-reservation conduct,⁹⁶ but the existence of jurisdiction over other defendants depends not only on membership status but a host

would have expressly said so”).

⁹⁴ Consider, for example, the tenuousness of the connection that may justify haling an out-of-state defendant into another state’s courts under the Supreme Court’s jurisprudence of personal jurisdiction. *See, e.g., McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (Texas corporation’s assumption of insurance policy of a California resident was sufficient to subject it to personal jurisdiction in California); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, No. 01-17424 (9th Cir. Jan. 12, 2006) (California court had personal jurisdiction over French nonprofit that had sent a cease-and-desist letter ordering Web service to take certain actions in California or face legal action). In such situations, the state lacks regulatory jurisdiction in the ordinary sense of the term, but clearly possesses adjudicative jurisdiction.

⁹⁵ Of course, litigant identity — as “Indian” or “non-Indian” — can be in itself a vexing question. *See Sanapaw v. Smith*, 335 N.W. 2d 425, 430 (Wis. Ct. App. 1983) (concluding that its jurisdiction depended on whether the defendant should be considered Indian or non-Indian, and remanding for consideration of his “racial status, habits, and lifestyle”).

⁹⁶ Tribal-court jurisdiction over tribe members in a case involving off-reservation contacts is more uncertain. Some state courts have assumed jurisdiction over cases where both litigants are Indian if significant events took place off the reservation. *See Reynolds, supra* note 6, at 549 (discussing *Lewis v. Sac & Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994), which involved a suit by Indians against a tribal housing authority). Other

of other factors: whether relevant events took place within reservation borders,⁹⁷ the ownership of the land on which the cause of action arose,⁹⁸ and the importance of the issues at stake to tribal interests.⁹⁹ Further, the relative weight these factors should be accorded is not always clear.¹⁰⁰

Although this article focuses on tribal law in state courts, the outer boundaries of tribal-court jurisdiction are also relevant in several ways to the role of state courts in applying tribal law. Where tribal courts lack power to hear a case with tribal contacts, state courts are generally the only available forum. Rules about which cases tribal courts are forbidden to hear, therefore, determine which cases state courts will end up adjudicating and ensure that many cases involving tribal contacts will end up in state court. In addition, tribal adjudicatory and regulatory jurisdiction are generally coextensive, and limits on both forms of tribal jurisdiction may have implications for how state courts conceive of tribal sovereignty for choice-of-law purposes.

In light of these considerations, the following section thus explores the current state of tribal-court adjudicative power, first briefly describing the cases in which the Court has announced limits on tribal jurisdiction, then considering in more detail the effects of the regime the Court has created.

a. Rewriting Tribal Sovereignty

In the late 1970s, the Court surprised many observers when it first held that there were limits to the sovereign authority of tribes to regulate or punish the conduct of nonmembers.¹⁰¹ In

uncertain scenarios include cases in which an Indian is haled into the courts of a tribe of which she is not a member.

⁹⁷ See, e.g., *Smith v. Salish Kootenai College*, No. 03-35306, (9th Cir. Jan. 10, 2006).

⁹⁸ See *Strate*, 520 U.S. at 442-43.

⁹⁹ See *Bourland*, 492 U.S. at 441.

¹⁰⁰ See Section II.B.1.b *infra* (comparing different approaches of *Strate* and *Hicks*).

¹⁰¹ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978). Such assertions of criminal jurisdiction were fairly widespread at the time; according to the Court, 33 tribes had passed provisions extending criminal jurisdiction to nonmembers. *Id.* at 196.

Oliphant v. Suquamish Indian Tribe, the Court held that the Suquamish Tribe lacked criminal jurisdiction over a nonmember who had been arrested and charged with assaulting a tribal officer.¹⁰² Finding that tribes had lost much of their inherent powers by virtue of their incorporation into the “overriding sovereignty” of the United States,¹⁰³ the Court held that tribes possessed only “‘quasi-sovereign’ authority” and were prohibited from exercising powers “inconsistent with [this] status.”¹⁰⁴

Although *Oliphant* suggested that limitations on tribal sovereignty were narrow and confined to the area of criminal jurisdiction,¹⁰⁵ in relatively short time the Court extended these restrictions to the civil context. In *Montana v. United States*,¹⁰⁶ the Court set out the principles of tribal regulatory jurisdiction that have guided it for the past quarter-century. *Montana*’s immediate holding was that the Crow Tribe lacked power to regulate hunting and fishing by nonmembers on privately owned land within the reservation.¹⁰⁷ More generally, the Court found, tribes did not possess any sovereign powers “beyond what is necessary to protect tribal self-government or to control internal relations.”¹⁰⁸ These limits on tribal powers were subject to just two explicit exceptions. Tribes might permissibly regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” and retained the power to “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the

¹⁰² *Id.* at 195.

¹⁰³ *Id.* at 209.

¹⁰⁴ *Id.* at 208.

¹⁰⁵ *Id.* at 195 (question decided was whether “Indian tribal courts have criminal jurisdiction over non-Indians”).

¹⁰⁶ 450 U.S. 544 (1981).

tribe.”¹⁰⁹ Further, the Court suggested, the Tribe might legitimately exercise power to regulate the activities of non-Indians on tribal trust land or Indian-owned land.¹¹⁰

The Court did not immediately apply *Montana* to the tribal adjudicative context; in fact, it initially gave indications that tribal jurisdiction extended more broadly than regulatory jurisdiction. In *Iowa Mutual Ins. Co. v. LaPlante*,¹¹¹ the Court observed that “[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation . . . their civil jurisdiction is not similarly restricted.” Instead, the Court found, “[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts.”¹¹²

Contemporary observers noted a tension between the restrictive approach of *Montana* and *LaPlante*’s broad affirmation of tribal-court power.¹¹³ In *Strate v. A-1 Contractors*,¹¹⁴ the Court finally resolved the tension in favor of the *Montana* approach, holding that “[a]s to nonmembers, . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Strate* involved a collision between two vehicles, one driven by the widow of a Three Affiliated Tribes member and one driven by a non-Indian contractor doing on-reservation landscaping work for a tribal community building.¹¹⁵ The accident occurred on a state highway within the geographical boundaries of the reservation.¹¹⁶ The injured woman, who was not herself a tribe member, and

¹⁰⁷ *Id.* at 564.

¹⁰⁸ *Id.* at 564.

¹⁰⁹ *Id.* at 565-66.

¹¹⁰ The Court observed, seemingly with approval, that the district court had held that “Montana’s statutory and regulatory scheme d[id] not prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members.” *See id.* at 566-67.

¹¹¹ 480 U.S. 9, 15 (1987).

¹¹² *Id.* at 18.

¹¹³ *See, e.g., Reynolds, supra* note 6, at 566 (describing the two approaches as “flatly inconsistent”).

¹¹⁴ 520 U.S. 438, 453 (1997).

¹¹⁵ *Id.* at 442-43.

¹¹⁶ *Id.* at 443.

her children, all members of the tribe, sued the non-Indian contractor in tribal court.¹¹⁷ The Court held that the tribal court lacked jurisdiction over the case. While again emphasizing that “tribes retain considerable control over nonmember conduct on tribal land,” the Court nonetheless found that, in this case “[t]he right-of-way North Dakota acquired for the State’s highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land.”¹¹⁸ The Court thus rested its decision on *Montana*’s “general rule” that, apart from exceptions for consensual relationships and actions directly affecting the tribe’s political integrity, “tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation.”¹¹⁹

Even as it clarified the law to some extent, *Strate* also signaled that multiple factors would have to be taken into account in determining whether tribal court jurisdiction existed. The facts of *Strate*, on their face, pointed in more than one direction. The accident had occurred on tribal trust land within the reservation; on the other hand, the state had a right-of-way over the land.¹²⁰ By virtue of his work on the reservation, the contractor-defendant had voluntarily entered into at least a minimal relationship with the tribe; nonetheless, the connection was not extensive enough to trigger *Montana*’s exception for consensual relationships.¹²¹ Although

¹¹⁷ *Id.* at 443.

¹¹⁸ *Id.* at 454.

¹¹⁹ *Id.* at 446.

¹²⁰ *Id.* at 442-43.

¹²¹ While suggesting that the *Montana* “consensual relationship” exception applied primarily to contract disputes, the Court in fact cited at least factors in determining that the case at issue did not fall within the exception. First, the case involved “tortious conduct” and therefore did not arise out of a contract. Second, the dispute was “distinctly non tribal in nature,” as it arose between two non-Indians involved in a “run of the mill highway accident” (brackets and quotation marks omitted). Finally, the injured woman was not a party to the subcontract between A-1 and the tribe. *Id.* at 457. It is also notable that the record was unclear about whether the contractor had been on the job at the time of the accident; the court did not appear to regard this factor as significant.

several of the plaintiffs were tribe members, the injured woman was not.¹²² While the Court did not indicate that any of these facts was individually dispositive, the tribe would almost certainly have had a far stronger case for jurisdiction had all facts pointed more definitively toward the tribe.

In *Nevada v. Hicks*,¹²³ the Court purported to clarify *Strate*'s holding, but may have only succeeded in further complicating the issue. Hicks, a member of the Fallon Paiute-Shoshone Tribes living on the reservation, sued state and tribal officers in tribal court, claiming that in the course of searching his house, they had damaged his property and exceeded the bounds of their warrant.¹²⁴ As an ironic result of the extensive cooperation that had occurred between state and federal authorities, the case presented complex issues of overlapping state and tribal power. The state court had conditioned its search warrant for Hicks's property on the agreement of tribal authorities, and the state game warden and a tribal officer ultimately conducted the search jointly.¹²⁵ Hicks's suit alleged claims for trespass to land and chattels and abuse of process; he also claimed several violations of his federal rights under 42 U.S.C. § 1983.¹²⁶

The Court phrased the central question narrowly, as concerning only the tribe's adjudicative jurisdiction over "state officers enforcing state law" — and in particular over state officers seeking evidence of an off-reservation crime.¹²⁷ With the question thus framed, the Court found that the Tribe's lack of authority was clear.

As far as this part of the decision went, *Hicks* represented an easy application of *Strate*

¹²²*Id.* at 443. There was a dispute as to whether Fredericks resided on the reservation, but the Court held that her residence was "immaterial." *Id.* at 443 n.2.

¹²³533 U.S. 353 (2001).

¹²⁴*Id.* at 355. The authorities were looking for evidence that Hicks had illegally killed a California bighorn sheep.

¹²⁵*Id.* at 355-56.

and *Montana*, rather than an extension of them. Indeed, the Court took care to frame the first part of its holding with almost comically narrow precision, as addressed only to the question of “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.”¹²⁸

The second part of the Court’s holding was, however, more surprising. The Court also found that the tribal court lacked jurisdiction over the several federal claims Hicks asserted under § 1983. The Court based this holding on “the restrictions inherent in tribal court jurisdiction,” which “made it impossible that they be courts of general jurisdiction.”¹²⁹ Thus, the Court suggested, tribal courts could entertain federal causes of action only when Congress had specifically so provided.¹³⁰ In reaching this conclusion, the Court went beyond *Strate*’s conclusion that tribal adjudicative jurisdiction did not exceed legislative jurisdiction; the Court’s decision to leave open “whether a tribe’s adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction” allowed for the possibility that the Court might ultimately find adjudicative jurisdiction to be the narrower of the two.¹³¹ Further, the Court indicated for the first time that this limitation on tribal courts was one of subject-matter jurisdiction¹³² and hence, presumably, nonwaivable. Thus, while *Strate* did not represent a radical extension of *Hicks*, the new restrictions on tribal jurisdiction it announced were nonetheless significant.

¹²⁶ *Id.* at 357.

¹²⁷ *Id.* at 358.

¹²⁸ *Id.* at 355.

¹²⁹ *Id.* at 367.

¹³⁰ *Id.* at 367.

b. Tribal Cases In State Court: The Impact of *Strate* and *Hicks*

In *Strate* and *Hicks*, the Court established a balance between a tribe's legislative and adjudicative jurisdiction that is, in many ways, the opposite the balance that exists with respect to states. In contrast to tribal courts under the regime that *Strate* and *Hicks* established, state courts have far more extensive jurisdiction to hear disputes involving Indian litigants than state legislatures do to regulate the conduct of tribe members.¹³³ More generally, the jurisdiction of state courts is broader than, and distinct from, the realm in which state legislatures can permissibly regulate; to take the most obvious example, an out-of-state defendant may be haled into court under a long-arm statute to answer for conduct that the state legislature could not regulate directly.¹³⁴ In finding tribal jurisdiction to be no greater — and possibly less extensive — than tribal regulatory power, the Court signaled a view of tribal courts that could scarcely have been more different from the one it had expressed in *Williams*.

Hicks also complicated the decision to bring a case in tribal court in another way — by casting doubt upon the factors that the Court in *Strate* had suggested would be central to a determination of tribal jurisdiction. *Strate* had indicated that a significant consideration in establishing the existence of tribal jurisdiction was whether the land on which relevant events had occurred was tribal-owned trust land or private fee land.¹³⁵ The *Hicks* Court, by contrast, found that “[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government

¹³¹ *Id.* at 357-58.

¹³² *Id.* at 368.

¹³³ Indeed, as previously discussed, the holding of *Bryan* depends on this distinction.

¹³⁴ See *supra* note 94.

¹³⁵ See 520 U.S. at 454 (stating that “tribes retain considerable control over nonmember conduct on tribal land”).

or to control internal relations.’”¹³⁶ Thus, *Hicks* not only indicated that the existence of tribal jurisdiction would remain a fact-based, case-by-case analysis, but put litigants on notice that the factors that would be considered in this analysis remained subject to change.¹³⁷

Therefore, the effect of *Strate* and *Hicks* has been not only to restrict tribal courts’ jurisdiction over many claims that concern tribal matters, but to ensure that a litigant will often have to endure lengthy uncertainty before receiving a tribal court judgment that is free of jurisdictional challenge.¹³⁸ By contrast, Indians always have the option of bringing cases against nonmembers in state court; indeed, under *Wold I* and *II*, state courts are *required* to hear such cases. Thus, the Court’s decisions may be said to have limited tribal-court jurisdiction in two ways: first, by establishing a class of claims that tribal courts are prohibited from hearing; second, by creating another class of claims in which a case can be made for tribal-court jurisdiction, but where considerations of efficiency, convenience, and jurisdictional certainty are likely to make state court the more appealing choice.

As a result of *Strate* and *Hicks*, therefore, the tribe may effectively lose all say in the outcome of many cases that have a clear relationship to tribe members and tribal lands. The

¹³⁶ *Id.* at 359 (quoting *Montana*, 450 U.S. at 564-565).

¹³⁷ The inability of the justices in *Hicks* to come to a stable resolution on this issue — even while agreeing on the outcome — was more acute than this short description can convey. Justice Souter’s concurrence, joined by Justices Kennedy and Thomas, would have interpreted *Montana* sweepingly to hold that “a tribe’s civil jurisdiction generally stops short of nonmember defendants,” subject only to *Montana*’s exceptions for consensual relationships and political integrity. *Id.* at 375. By contrast, a concurrence by Justice O’Connor, also joined by two other justices (Justices Stevens and Breyer), set forth a more robust vision of tribal power, and objected in particular to the majority’s language de-emphasizing land status, which in previous opinions had “always figured prominently in our analysis of tribal jurisdiction.” *Id.* at 375.

¹³⁸ This is true not only because the principles that determine whether a tribal court has jurisdiction are difficult to apply, but because the extent of tribal court jurisdiction is a federal issue, and defendants are required to exhaust jurisdictional challenges in tribal court before a federal court will hear their claims. Thus, a plaintiff who sues in tribal court may face jurisdictional challenges at all levels of the tribal judicial system; even if jurisdiction is upheld, the defendant can continue to pursue jurisdictional challenges in federal court. The ultimate result, if a federal court finds that the tribal court lacked jurisdiction, is that the plaintiff may have to restart the lawsuit from the beginning in

Court, however, has never explicitly considered the tribal-sovereignty issues that are entailed in shunting this class of cases into state rather than tribal court. Indeed, the Court has essentially suggested that, for a tribal plaintiff, any remedy is a good remedy — in other words, as long as the plaintiff can recover in state court, the unavailability of a tribal forum is no great injustice.¹³⁹ Setting aside the issue of whether this is true in individual cases — and it may not be, either because tribal law is more favorable to plaintiffs than state law or because bringing the claim in state court entails severe inconvenience¹⁴⁰ — the Court’s approach is problematic because it gives no weight to the tribe’s institutional interests in having cases in which the tribe has a legitimate interest decided according to tribal law. This is a notable contrast to the Court’s language in cases like *Fisher*, in which it suggested that the preferences of individual Indian litigants for state forums must be subordinated to the tribe’s stake in having internal legal issues decided in its own courts.¹⁴¹ By contrast, *Strate* and *Hicks* assume that, as long as an individual Indian plaintiff has her day in court, no substantial unfairness has resulted.

The forum-based approach the Supreme Court has followed is thus both cumbersome from a standpoint of judicial economy and inadequate to serve many legitimate tribal sovereign interests. The next section considers how the state-tribal case allocation problem might be reimagined, at least in part, as a choice-of-law question, and how such an approach might better

state court.

¹³⁹ In *Strate*, for example, the Court recognized that “those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members,” 520 U.S. at 457-58; nonetheless, the Court appeared to believe that, in light of the availability of a state forum, a tribal remedy was unnecessary. *Id.* at 459.

¹⁴⁰ State court may be most obviously inconvenient simply for its physical distance from the reservation — a burden that would not be eliminated even if the state court were permitted to apply tribal law. Suing in state court may, however, impose other burdens on the plaintiff — the burden of familiarizing herself with state law, for example — that would be reduced if the plaintiff had the option of suing on tribal-law claims in state court.

¹⁴¹ 424 U.S. at 390-91.

serve the needs of states, tribes, and litigants.

II. Applying Choice-of-Law Principles in the Tribal Context

As the preceding section has sought to establish, the forum-selection rules the Supreme Court has established have generally (if not exclusively) operated against a background assumption that both state and tribal courts will apply forum law. In addition, the Supreme Court has made clear that tribal courts may only exercise jurisdiction in cases to which the tribe could apply tribal law in any case, and that Congress, in general, does not intend for tribal courts to hear federal causes of action. No such barrier exists, of course, to tribal-court application of state law, and some tribes do, in fact, apply state law — for example, to fill in gaps in tribal codes.¹⁴² But no general principle of federal Indian law obliges tribes to do so. Moreover, as the Supreme Court has increasingly restricted tribal-court jurisdiction to matters concerning the internal relations of tribes, most cases brought in tribal court are likely to involve tribe members and concern matters occurring solely within the boundaries of the reservation. Thus, it is normally a fair expectation that when a case is brought in tribal court, tribal law should and will apply.

The purpose of this section is to argue that the parallel proposition need not prevail in state court — that is, that when matters involving Indians appear in state court, state courts should not automatically apply state law.¹⁴³ Instead, states should treat tribes in the same manner as they do sister states or foreign nations, consulting their usual choice-of-law principles to determine whether tribal law should be applied.

In one sense, this is not a surprising recommendation. More than one commentator has

¹⁴² Pearson, *supra* note 4, at 718.

¹⁴³ For a general argument that state and tribal courts need not always have symmetrical obligations toward each other, see Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for*

observed that state choice-of-law principles, considered in the abstract, would frequently dictate the application of tribal law to state-court cases.¹⁴⁴ Some state courts have, in fact, experimented with applying tribal law.¹⁴⁵ Other state courts, however, have hesitated to do so for a variety of reasons. State courts have expressed concerns that the application of tribal law by a non-Indian court constitutes an infringement on tribal sovereignty; they have also worried that the process of establishing the content of tribal law on a given subject is simply too difficult.¹⁴⁶ Far more frequently, however, state courts have, with little explanation, simply neglected to engage in choice-of-law analysis at all, simply assuming that state law will apply to cases involving tribes that are brought in state court.¹⁴⁷

Under current choice-of-law principles, this assumption is simply not viable. Although the atypical nature of tribal sovereignty may require some adjustments, state courts following commonly accepted choice-of-law principles should apply tribal law to many of the cases involving tribal matters over which they have jurisdiction. Further, such a practice would have distinct advantages, promoting tribal interests while more generally facilitating greater efficiency and judicial economy in cases that cross reservation borders.

A. The Development and Content of Modern Choice-of-Law Theory

The field of conflicts of law attempts to address a basic problem: What should a court do when confronted with a case to which the law of more than one sovereign could apply? Such situations arise frequently. State courts, for example, often possess jurisdiction over out-of-state

the Enforcement of Money Judgments Across Indian Reservation Boundaries, 27 Conn. L. Rev. 979, 981 (1995).

¹⁴⁴ See Canby, *supra* note 17, at 214-15; Pearson, *supra* note 4, at 716-19 (2000) (discussing the possibility of applying various choice-of-law theories to cases with tribal contacts).

¹⁴⁵ See, e.g., Pearson, *supra* note 4, at 717 n.125 (citing examples of state-court willingness to apply tribal law).

¹⁴⁶ See, e.g., *Warm Springs Products Inds. v. Employee Benefits Ins. Co.*, 300 Ore. 617 (1986).

defendants, and are open to suits by out-of-state plaintiffs. Choice-of-law problems, therefore, have vexed courts for at least several centuries¹⁴⁸; they are particularly common in the United States, where plaintiffs have great flexibility in selecting a forum and where many cases involve contacts with a variety of states.

The idea that the courts of one sovereign might enforce the laws of another has historically been a source of some perplexity. After all, once a forum has established its jurisdiction over a case, forum law might seem the best candidate for the law that should govern; it is the law with which the forum state is most familiar and seemingly has the clearest authority to apply.¹⁴⁹ Nonetheless, there are practical and philosophical difficulties with the application of forum law in every case. Most obviously, such a practice promotes forum-shopping, since strong incentives would exist for both plaintiffs and defendants to try to have the case heard in the forum with the most favorable law.¹⁵⁰ Further, a forum-centered approach has the potential to create stark instances of unfairness — perhaps even, in extreme cases, constitutional problems¹⁵¹ — if forum law were applied to govern the actions of defendants who possessed only a minimal connection to the forum. For these and other reasons,¹⁵² all 50 states have historically been

¹⁴⁷ See Reynolds, *supra* note 6, at 558.

¹⁴⁸ See generally Friedrich K. Juenger, CHOICE OF LAW AND MULTISTATE JUSTICE (1993).

¹⁴⁹ See *id.* (noting that “there is an astonishing lack of consensus on a fundamental question, namely why courts, sworn to uphold the forum’s laws and constitution, should ever apply foreign law”).

¹⁵⁰ See Herbert Goodrich, *Public Policy in the Law of Conflicts*, 36 W.Va.L.Q. 156, 165 (1930) (arguing for use of choice-of-law doctrine to prevent forum-shopping).

¹⁵¹ That is, while neither the due-process requirements for personal jurisdiction nor those that determine whether a given state’s law can be applied to a case are particularly stringent, it is possible that a forum may possess personal jurisdiction over a defendant in a given case but lack the ability to apply its substantive law to the questions before it. (This is most often true in class actions in which members of the class have little connection to the forum. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

¹⁵² For a succinct list of these reasons, see Joseph P. Bauer, *The Erie Doctrine Revisted: How a Conflicts Perspective Can Aid the Analysis*, 74 Notre Dame L. Rev. 1235, 1237 (1999) (“Among the frequently stated rationales [for applying non-forum law] are the desire for uniformity of outcome; the predictability and certainty that flow from that expected uniformity; the goal of affording fairness to the parties; comity based on respect for the sovereignty of other

willing to apply the law of other states (and, generally, of other nations as well) when certain conditions are met.¹⁵³

Prior to the mid-twentieth century, most states followed a similar set of relatively bright-line choice-of-law principles. These principles tended to be grounded in geography and territory, resting on the premise that a given cause of action should be governed by the law of the place where relevant events occurred.¹⁵⁴ Under the traditional approach, for example, the validity of a contract was governed by the law of the place of contracting, while breach of contract was governed by the law of the place of performance.¹⁵⁵ Under the principle of *lex loci delicti* — the law of the place of the wrong — torts were governed by the law of the state where the injury had occurred.¹⁵⁶ Matters that were purely procedural were nearly always governed by the law of the forum.¹⁵⁷ These clear, precise principles — which had the advantage of being easy to apply and the disadvantage of being rigid — were described at length in the Restatement (First) of Conflict of Laws, which appeared in 1934.¹⁵⁸

jurisdictions and their interests in the parties and the dispute, and the resultant enhancing of harmonious relations; facilitation of interstate and international commerce and travel; promoting ease of judicial administration; and the oft-cited aphorism, the wish to prevent ‘forum shopping.’”).

¹⁵³ See Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 Am. J. of Comp. L. 919 (2004).

¹⁵⁴ See David P. Currie, Herma Hill Kay & Larry Kramer, *CONFLICTS OF LAWS* 6th ed. 13 (1993) (“Regardless of their heated arguments over the theories of comity, vested rights, and local law, adherents of the traditional learning essentially agreed on the territorial principle: The governing substantive rule was derived from the law of the place where relevant events had occurred.”)

¹⁵⁵ See Restatement of Conflict of Laws § 332, § 358 (1934).

¹⁵⁶ See Restatement of Conflict of Laws § 377 (1934) (“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”). The accompanying note clarified that, in personal injury cases, this was “the place where the harmful force takes effect on the body.” *Id.* at § 377, Note. This approach thus generally looked to the place of injury, not to the place where negligent conduct might have occurred.

The Restatement allowed for a few exceptions, however; the standard of care, for example, was determined by the “place of the actor’s conduct.” *Id.* at § 380(2).

¹⁵⁷ Restatement of Conflict of Laws § 585 (1934).

¹⁵⁸ *Id.*

Choice-of-law theorists gave two competing explanations for the use of these principles as a way to resolve conflicts between the law of the forum and that of another sovereign. Joseph H. Beale, whose theories had wide influence on choice-of-law doctrine in many states, propounded the notion of “vested rights” — the idea that, as soon as the relevant elements of a cause of action recognized in a particular place occurred, they immediately gave rise to a right that persisted across state borders and that courts in other jurisdictions were bound to respect.¹⁵⁹ By contrast, another influential treatise by Justice Story held that a sovereign’s decision to enforce another’s law was purely voluntary. According to Story, state law was only directly applicable to “all property ... within its territory; and all persons, who are resident within it, ... and also all contracts made, and acts done within it.”¹⁶⁰ Therefore, when jurisdictions applied foreign law, they did so as a matter of comity, not necessity.¹⁶¹ While Beale and Story thus offered nearly opposite justifications for the applicability of foreign law, their theories shared a territorial focus — focusing on the power states had over events occurring within their borders.

The territorial view of Beale, Story, and the First Restatement prevailed for many decades. Toward the middle of the twentieth century, however, courts and legal scholars began to criticize the first Restatement principles, noting that they were overly formalistic and, as a result, highly susceptible to manipulation. Courts intent on applying the law of one state rather than another could, for example, strain to find that a given foreign-state law was procedural rather than substantive, or that a contract case was really about validity rather than breach.

¹⁵⁹ See 1 J. Beale, *Treatise on the Conflict of Laws* § 73 at 105 (1916).

¹⁶⁰ Justice Story, *Commentaries on the Conflict of Laws* (2d ed. 1841) § 18.

¹⁶¹ *Id.* at § 23 (“[W]hatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.”).

Brainerd Currie, perhaps the most famous of the academic reformers, blasted the First Restatement's methodology as "loaded with escape devices," including the device of "novel or disingenuous characterization" described above, the device of "manipulating the connecting factor" (i.e., emphasizing or de-emphasizing the importance of a particular contact), and the device of declaring a foreign state's law to be against "local public policy" as a basis for not applying the relevant law.¹⁶²

More substantively, courts and scholars began to question whether the rigid categories of the Restatement rested on a sensible doctrinal and theoretical foundation.¹⁶³ Perhaps because of the influence of Beale and the vested rights theory, choice-of-law principles tended to focus on a single moment at which a cause of action became complete — ignoring the fact that other relevant conduct may have taken place at an earlier point. Questions of contract validity, for example, focused on the place of execution, even if the contract had been negotiated elsewhere; tort cases considered only the place of injury, even if that injury was the direct result of negligent conduct in another state. Further, by focusing exclusively on place, courts ignored other significant considerations, such as the policies reflected in a given law and the interests a state might have in the well-being of its citizens even when they traveled beyond state borders.¹⁶⁴

Ultimately, these criticisms helped to launch what has become known as the "conflicts revolution,"¹⁶⁵ a series of competing proposals for choice-of-law principles to replace the First Restatement approach. Among the more influential proposals put forth was the method of

¹⁶² Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 175.

¹⁶³ See, e.g., *id.*; David F. Cavers, *A Critique of the Choice of Law Problem*, 47 Harv. L. Rev. 173 (1933); *Babcock v. Jackson*, 12 N.Y.2d 473 (1963); *Symposium, Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 Colum. L. Rev. 1212 (1963).

¹⁶⁴ See generally *id.*

resolving conflicts known as “interest analysis,” developed and advanced by Brainerd Currie.¹⁶⁶ Under Currie’s proposal, when a party urged the application of a law other than forum law, a court was to look to the “governmental policy expressed in [forum] law” and determine whether the forum had an interest in having its law applied.¹⁶⁷ If the forum lacked any such interest and the foreign state had an interest, foreign law would apply; in all other cases, forum law would apply.¹⁶⁸ Courts would determine what constituted an “interest” by considering whether application of the law would directly advance the law’s underlying policy.

Most famously, Currie considered a common choice-of-law problem of his era: the enforcement of contracts entered into by married women, which under the paternalistic policies of the time were invalid under the laws of certain states.¹⁶⁹ Currie’s key recognition was that a state might not have an equal interest in applying a particular law, such as the married woman’s disability, to every transaction. Under Massachusetts law of the time, for example, married women’s contracts were not enforceable.¹⁷⁰ As Currie recognized, however, this law had been enacted for the protection of *Massachusetts* women.¹⁷¹ Therefore, if a Massachusetts creditor wished to enforce a contract executed by a married woman residing in Maine, a state that enforced married women’s contracts, Massachusetts should have no objection to enforcing the contract and Maine law should thus apply. In Currie’s view, therefore, this was an example of a

¹⁶⁵ See Gene R. Shreve, A CONFLICT-OF-LAWS ANTHOLOGY (1997) 57.

¹⁶⁶ Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171.

¹⁶⁷ *Id.* at 178.

¹⁶⁸ *Id.*

¹⁶⁹ See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U.Chi.L.Rev. 227 (1958).

¹⁷⁰ *Id.* at 234.

¹⁷¹ *Id.*

false conflict — a case in which Maine and Massachusetts law might differ, but in which only one state (in this case, Maine) had a genuine interest in the application of its law.¹⁷²

Currie's proposals were both hailed and criticized by commentators. Many academics pointed out flaws in Currie's approach — in particular, its strong bias in favor of forum law, which Currie's critics believed that he had failed to justify adequately¹⁷³ — and offered their own diverse proposals. Some were variations on interest analysis; William Baxter, for example, argued that courts should resolve true conflicts between state laws by “determin[ing] which state's internal objective will be least impaired by subordination [to another state's interest] in cases like the one before it.”¹⁷⁴ Others advocated wholly different methods of resolving conflicts. Robert A. Leflar, for example, advocated that courts choose the law that was “better,” in the sense of “mak[ing] good socio-economic sense for the time in which the court speaks”¹⁷⁵ — a view opposite to that of Currie, who believed that courts should not be in the business of making policy-based choices between the laws of different states.¹⁷⁶ Courts as well as academics worked out alternatives to the traditional principles. In 1963, New York broke forcefully with tradition by announcing that it would make choice-of-law determinations based on the relative number of contacts the litigants had with each competing jurisdiction and the degree of interest

¹⁷² *Id.* at 238.

¹⁷³ See, e.g., Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 Am. J. Comp. L. 1 (1984); Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 Yale L.J. 1191 (1987).

¹⁷⁴ William Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963).

¹⁷⁵ See R.A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584 (1966). Leflar in fact advocated consideration of several factors, including predictability, maintenance of interstate order, simplification of the judicial task, and advancement of the forum's governmental interests, in addition to the question of which law was “better,” although he did acknowledge that the latter factor was a “potent” one.

¹⁷⁶ Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 176-77 (observing that weighing competing state interests was a “political function” and not one that should be “committed to courts in a democracy”).

each jurisdiction had in seeing its law applied to the case¹⁷⁷ — a method the court described as the “center of gravity” approach.¹⁷⁸ Other states, including California¹⁷⁹ and Pennsylvania,¹⁸⁰ developed their own methods as well.

Because of the lack of consensus about the direction reform should take, the drafting of the Second Restatement was a source of controversy, and many were displeased with the ultimate result, published in 1971.¹⁸¹ A central problem was that the Second Restatement provided courts with an array of factors to apply, but offered little guidance as to which should be most important. The Second Restatement’s general approach was to instruct courts to choose the law of the state with the “most significant relationship” to the cause of action; that determination, however, was in itself based on a variety of factors. For example, where torts were concerned, courts were to look the traditional place-of-injury criterion, but also to consider other factors: the place of conduct causing the injury; the domicile, residence, and place of business of the parties; and the place where the parties’ relationship was “centered.”¹⁸² Unhelpfully, the Restatement added that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.”¹⁸³

The Restatement’s approach to contract law was similar. Although it advocated general deference to the parties’ choice of law, in the absence of any effective choice it counseled courts

¹⁷⁷ *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

¹⁷⁸ *Id.* at 282.

¹⁷⁹ *See Bernhard v. Harrah’s Club*, 16 Cal. 3d 313 (1976) (applying a version of Baxter’s “comparative impairment” analysis — i.e., the principle that “true conflicts should be resolved by applying the law of the state whose interest would be more impaired if its law were not applied”).

¹⁸⁰ *See Cipolla v. Shaposka*, 439 Pa. 563, 565 (1970) (considering, after establishing that a true conflict exists, which state has the greater interest in the application of its law).

¹⁸¹ *See Shreve*, *supra* note 165, at 189-90.

¹⁸² Restatement (Second) of Conflicts of Law, § 145.

¹⁸³ *Id.*

to look to a motley assortment of factors, some traditionally territorial — such as the place of contracting and the place of performance — and some more novel, such as the domicile of the parties.¹⁸⁴ To further complicate matters, the Second Restatement was unclear about the degree to which it actually represented a break with tradition, instead suggesting that in most cases it would produce results similar to those mandated by the previous Restatement. In several sections discussing specific tort problems, for example, the Second Restatement included the comment that “[t]he applicable law will usually be the local law of the state where the injury occurred”¹⁸⁵ — a statement that echoed the First Restatement.¹⁸⁶

Perhaps as a result of the fact that the Second Restatement did not take a strong stand in choosing among competing methods, the decades since the Second Restatement have resulted in a diversity of approaches from state to state. Where tort law is concerned, for example, ten states currently follow traditional First Restatement principles, about twice that number follow the Second Restatement, and the remainder follow other modern approaches.¹⁸⁷ The breakdown of approaches is similar in contracts, although some states that apply traditional principles to torts adopt modern doctrines for contracts and vice versa.¹⁸⁸ There is considerable diversity even among the smaller subgroup of states that hear the majority of Indian-law cases. New Mexico, for example, follows traditional principles; Arizona, Montana, Oklahoma, Washington, South

¹⁸⁴ *Id.* at § 188.

¹⁸⁵ Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 Am. J. of Comp. L. 813 (1994).

¹⁸⁶ See Shreve, *supra* note 165, at 188.

¹⁸⁷ See Symeon C. Symeonides, *supra* note 153, at 944.

¹⁸⁸ *Id.*

Dakota, and Utah¹⁸⁹ generally follow the Second Restatement; and California, Minnesota, North Dakota, Oregon, and Wisconsin follow other modern principles.¹⁹⁰

Nonetheless, despite the increased variety that prevails in the post-Second Restatement era, the choice-of-law principles of many states continue to have elements in common. For example, most states take into account, to a greater or lesser extent, some or all of the following factors: the domicile, residence, and workplace of the parties; the place of relevant events; the interests of the various states whose law may be at issue; and the expectations of the parties.¹⁹¹ Further, choice-of-law theory has not escaped its traditional territoriality.¹⁹² Sometimes the territorial element is obvious, in both traditional factors such as the place of injury and “modern” ones such as party domicile. Other factors have a subtler territorial component. Party expectations, for example, may be affected by the place where the majority of relevant events, or the most significant ones, occurred.¹⁹³ Further, it is hard to talk about state governmental interest without talking about geography, since states are generally considered to have little or no legitimate interest in regulating events that occur outside their borders and cause no effects inside them.¹⁹⁴

Whatever their other differences, therefore, choice-of-law theories tend to rely on a place-based notion of political power — the idea that states have legitimate interests in the events that occur within their borders and the people who reside there. There is inevitable difficulty in

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 944.

¹⁹² See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L.J. 1277, 1306 (1989) (“Clearly there is no way to formulate a choice of law regime other than to found it upon territorial assumptions of some sort.”)

¹⁹³ Any regime based on party expectations is, of course, inevitably circular: people’s expectations will be shaped by what the law is. But the expectation that, within territorial boundaries of a given sovereign, one is subject to that sovereign’s law is a deeply entrenched one that changes in choice-of-law practice are unlikely to dislodge easily.

translating these notions to the Indian-law context, where the scope of tribal regulatory and adjudicatory jurisdiction is not based merely on geography, but on a complex mix of geography, land ownership, tribal membership, and strength of tribal interests.

B. Making Sense of Choice of Law in the Tribal Context

The following section considers how choice-of-law concepts might be applied in the tribal context. This section first considers the issues entailed — both in the abstract and in practice — when state courts attempt to apply territorial notions in a realm in which the reach of sovereign authority is more uncertain. Second, it considers how a choice-of-law approach might be better suited than the current case-allocation regime to creating fair and efficient ways of resolving disputes that contain tribal contacts.

1. The Initial Problem of Translation

The territorial emphasis shared by most choice-of-law systems rests on the normally unproblematic assumption that a political entity has jurisdiction over events that occur within its borders, and further that such borders are familiar, predictable, and easy to discern.¹⁹⁵ In the Indian-law context, such assumptions do not always hold. The reservation's boundaries may be clear, but the reservation is nonetheless a place where, the Supreme Court has told us, tribes and states share regulatory authority¹⁹⁶; conversely, under the statutory definition of “Indian country,”¹⁹⁷ tribal authority may extend to pockets of Indian-owned land outside the reservation. Further, according to the *Montana* line of cases, the degree of authority the tribe possesses over a

¹⁹⁴ Brilmayer, *supra* note 192.

¹⁹⁵ As one commentator has observed, for example, “A rule of law may be construed to either to apply to people, things and transactions within a state, or to apply to the state’s subjects, wherever they may happen to be.” Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 Am. J. Comp. J. 1. 10-12, 33-44 (1984).

¹⁹⁶ See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (noting that “[s]tates and tribes have

particular parcel of land depends not only on whether it is within or outside Indian country, but also on a host of other factors: whether or not the land is tribal trust land¹⁹⁸; if the land is privately owned, whether it is owned by a member or a nonmember of the tribe¹⁹⁹; whether the state has a right-of-way over the land²⁰⁰; whether the land is especially significant to tribal life²⁰¹; and even whether the land is deep within the reservation or closer to its borders.²⁰²

As a result, the answers to normally straightforward choice-of-law questions are more complicated when events occur in Indian country. When an Indian is injured on a reservation by the negligent conduct of nonmember, for example, what is the “place” of the injury for choice-of-law purposes? The most obvious answer, of course, is that the place is the reservation itself. Yet this assumption is not free of difficulties. A tribe does not have complete control over its own territory; in all likelihood, it could not hale the nonmember-tortfeasor into its own courts, and it

concurrent jurisdiction over the same territory”).

¹⁹⁷ See 18 U.S.C. § 1151.

¹⁹⁸ *Strate*, 520 U.S. at 454.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989), one of the rare cases in which the Court has applied Montana’s “political integrity” exception, illustrates the fact-bound nature of tribal legislative jurisdiction. The case concerned two parcels of land located on the Yakima Reservation: a 160-acre tract owned by Philip Brendale, who was “part Indian but not a member of the Yakima Nation,” and who had inherited the parcel from family members; and a 40-acre tract “bordered on the north by trust land and on the other three sides by fee land,” owned by Stanley Wilkinson, a non-Indian and nonmember. *Id.* at 417-18. Further complicating matters, Brendale’s parcel was in a forested “closed area” of the reservation open only to Yakima Nation members and permittees; Wilkinson’s parcel was in an unrestricted “open area” of which nearly half was fee land. *Id.* at 415-16. In an opinion composed of fractured pluralities, the Court held that Brendale’s parcel fell within the “political integrity” exception to *Montana* and was thus subject to tribal zoning regulations; Wilkinson’s, however, did not. Justice Stevens’s concurrence, which announced the court’s judgment on Brendale’s parcel, found that the division of the reservation lands into a closed area consisting mostly of nonfee land and an open area with a large percentage of fee land was a fact of “critical importance” to the case. *Id.* at 437. Justice Stevens further relied on the character of the closed area’s use as an “undeveloped refuge of cultural and religious significance,” noting that the tribe had invoked its power to exclude nonmembers from the area and thus “preserved the power to define the essential character of that area.” *Id.* at 441. While acknowledging that his opinion was subject to the criticism that “it does not identify a bright-line rule,” Justice Stevens defended his approach on the grounds that “the factual predicate to these cases is itself complicated” such that it was impossible for the Court to “articulate precise rules.” *Id.* at 447-48.

²⁰² 492 U.S. at 441.

could not otherwise exercise sovereign power to fine or punish the nonmember for her behavior. While the reservation is clearly the “place” of the injury in the geographical sense, it is less obvious that it is the “place” in a choice-of-law sense.

Other choice-of-law factors state courts consider may also be difficult to translate into the Indian-law context. Some courts, for example, take into account the parties’ domicile in deciding which state’s law to apply.²⁰³ For purposes of determining jurisdiction in Indian law, however, a party’s decision to live on or off the reservation has always been secondary to the facts of that person’s race (Indian or non-Indian) and political status (member or nonmember of the tribe).²⁰⁴ Should the same be true in choice-of-law determinations?

The factor of party expectations may also point in a different direction where tribal law is concerned. Choice-of-law doctrines generally rely to some extent on the premise that, when someone, say, crosses from New York into Pennsylvania, that person is more likely to expect that Pennsylvania rather than New York law will apply to any transaction he may enter into or any events that may occur.²⁰⁵ In Indian-law cases, however, the Supreme Court has suggested that a non-Indian who enters a reservation does not expect to be subject to tribal law — and, indeed, that application of such law may therefore be unfair.²⁰⁶

²⁰³ Brilmayer has described domicile as having two components — “voice and exit.” Brilmayer, *supra* note 192, at 1307. While the concept of “exit” should presumably mean the same thing in the Indian-law context as it does in relations between states — that is, people have the same choice whether to live on or leave the reservation as they do whether to leave or remain in a given state — the idea of “voice” is more complex, since tribes commonly grant voting rights only to members. Should “voice” be understood narrowly as having to do with political rights, and should only members of the tribe therefore be considered fully “domiciled” on the reservation? Or should domicile encompass a broader notion of community and self-identification, so that nonmembers who live on the reservation, particularly if they have ties to the tribe or participate in tribal life, should be considered to have made the reservation their domicile?

²⁰⁴ See, e.g., *Strate*, 520 U.S. at 443 n.2 (finding that question of whether plaintiff resided on the reservation was “immaterial”).

²⁰⁵ See, e.g., Restatement (Second) of Conflict of Laws § 6(d).

²⁰⁶ See *id.* at 459 (expressing reluctance to require non-Indians to litigate a “commonplace state highway accident

State courts have mostly dealt with these problems by ignoring them. Only very rarely have state courts have considered whether their choice-of-law principles require them to apply tribal law; in the few occasions when state courts have addressed the issue, they have often quickly dismissed the possibility of applying tribal law.²⁰⁷

Whatever problems may exist in applying choice-of-law principles to the tribal context, this clearly cannot always be the right result. That is, however restrictively one understands the meaning of core choice-of-law concepts such as “place” or “domicile,” cases unquestionably exist in which a consistent application of choice-of-law principles should dictate the application of tribal law.

To see how this is so, consider the traditional principle that the law of the place of the injury should control tort cases. In this context, the phrase “the law of the place” might be said to mean one of two things. One might choose to place the emphasis on “place” — in other words, the entity within whose geographical borders an event occurs — and then apply the law of the sovereign with which that place is associated. In other words, if an event occurs within the reservation, the reservation is the “place,” and the “law of the place” is therefore tribal law. Second, one might, alternatively, place the emphasis on “law,” and view the phrase instead as referring to the sovereign possessing direct regulatory authority over events that occur in a particular place. When an event occurs within a reservation, either the state or the tribe might have that authority, depending on the various relevant factors enumerated in the *Montana* line of cases. Thus, under the second view, if the conduct at issue occurs, say, on the private land of a

claim in an unfamiliar court”).

²⁰⁷ See *supra* note 13.

nonmember, the “law of the place,” if understood to mean the law that *actually applies*²⁰⁸ in that place, under those circumstances, may be state law, even if the land is nominally located within the reservation.

However, there will certainly be cases in which *both* definitions are satisfied — if, for example, a tort occurs within the geographical boundaries of a reservation under circumstances in which the tribe would have authority to regulate the tortfeasor’s conduct. When this is the case, the conclusion seems inescapable that, under most choice-of-law principles, tribal law should apply; what, other than tribal law, could possibly qualify as the “law of the place”?²⁰⁹ Indeed, if one takes seriously some of the Court’s language in *Wold*,²¹⁰ application of state law under such circumstances might be preempted under federal law as conflicting with federal policies promoting tribal sovereignty and self-government.

Many other situations exist in which state courts should in theory have little difficulty applying tribal law. The factor of domicile, for example, is surely satisfied when a litigant is a tribe member *and* lives on the reservation. Similarly, it is reasonable to assume that a party who is a member of the tribe and performs an action on tribal trust land expects that tribal law will apply to his conduct; in states that place weight on the factor of party expectations, therefore, a strong argument would exist that tribal law should apply under such circumstances. Finally,

²⁰⁸ The question of which law “applies” to particular events is, of course, a somewhat circular one when the subject under discussion is choice-of-law doctrine. When a case concerning certain events is brought before a state court, the law that “applies” to those events will be the law of whatever sovereign the court chooses to apply. In a more narrow sense, however, it can be said that state law, rather than tribal law, applies to certain events taking place within the reservation because the tribe has no power to exercise its regulatory authority over those events.

²⁰⁹ This analysis of the “law of the place” is not merely relevant to states that follow the traditional approach, since conflicts law is permeated by geographical assumptions; even in the Second Restatement, place is usually a starting point for a choice-of-law analysis.

²¹⁰ See 476 U.S. at 889 (describing a requirement that tribes submit to state law as a prerequisite to access to state court as a “severe intrusion” on their sovereignty).

many states have adopted by statute choice-of-law principles that appear to allow for the application of tribal law. For example, provisions of the Uniform Commercial Code allow parties to a contract great latitude to select what law should apply.²¹¹ Under such statutes, there is no apparent barrier to allowing parties to elect by contract to have tribal law apply to contracts involving tribes or their members.²¹²

Thus, there are many circumstances under which choice-of-law principles appear to point unequivocally toward the application of tribal law. It is also important, however, to note that such “easy” cases do not exhaust the circumstances under which tribal law might apply to cases that appear in state court. The discussion above has considered how state choice-of-law principles may sometimes dictate the application of tribal law even if concepts like “place” and “domicile” are given their narrowest possible meaning. Yet taking such a narrow view would be an anomaly in state choice-of-law practice; indeed, states generally construe such concepts expansively. For example, where state-to-state conflicts of law are concerned, courts have generally assumed that “place” refers to any location within a state or nation’s geographical boundaries, not to the abstract reach of that entity’s sovereign authority. This is even true, perhaps even especially so, in states that follow the traditional principles of the First Restatement, which are designed to establish bright-line, formalistic rules that apply regardless of real-world conditions.²¹³ The famous case of *Alabama Great Southern RR Co. v. Carroll*,²¹⁴ for

²¹¹ See Uniform Commercial Code § 1-105 (parties may agree that their rights and duties will be governed by the law of a non-forum state or nation if such law bears a “reasonable relation” to the transaction).

²¹² In practice, such situations have been relatively uncommon, since contractual clauses specifying that tribal law will be applied to disputes often also require that suits be brought in tribal court. Nonetheless, after *Hicks*, it may be the case that parties have more a greater ability to elect that their dispute be governed by tribal law than they do to ensure that their case will be heard in a tribal forum.

²¹³ Though the court in *Carroll* used Beale’s now-discredited vested rights approach as a rationale for reaching this result, most courts that still subscribe to traditional principles have applied them based on other justifications, such

example, involved a train passing through several Southern states. Negligent maintenance of the train in Alabama caused a link between two cars in a freight train to break in Mississippi, injuring the plaintiff.²¹⁵ Although the plaintiff claimed that Alabama law should apply,²¹⁶ the court nonetheless applied Mississippi law because it was in Mississippi that the injury had occurred.²¹⁷ The court reached this conclusion despite the fact that Mississippi would certainly have had no power to pass laws directly regulating the maintenance of trains in Alabama. While the doctrinal reasons why tribes cannot directly regulate most nonmember conduct are of course somewhat different from the reasons Mississippi cannot regulate conduct outside its borders, it is difficult to see why the two situations should be, for choice-of-law purposes, distinguishable.²¹⁸

In certain cases under the traditional approach, the courts of the state whose law is to be applied may, in fact, lack adjudicative as well as regulatory jurisdiction over the matter; this might be the case if, for example, a state's long-arm statute allows for only limited jurisdiction over nonresidents in state court.²¹⁹ Thus, one could make the argument that if states were to apply the more restrictive view of the notion of "law of the place," as described above, to cases with tribal contacts, they would in fact be *departing* from ordinary choice-of-law practice.

as that of predictability and ease of administration. *See, e.g.,* Paul v. Nat'l Life, 177 W.Va. 427 (1986).

²¹⁴ 11 So. 803 (Ala. 1892).

²¹⁵ *Id.* at 805.

²¹⁶ Because Mississippi law followed the rule immunizing employers from liability for accidents caused by a fellow employee, plaintiffs could state a claim only under the law of Alabama, which had abandoned this rule. *Id.*

²¹⁷ *Id.* at 809.

²¹⁸ By way of analogy, a federal criminal statute incorporating tribal law has been held to apply even in cases where the tribe itself would not have the power to prosecute the underlying violation. The Lacey Act, 16 U.S.C. § 3372 (a)(1), makes it a criminal violation to buy or sell fish or wildlife taken in violation of any United States or tribal law. Federal convictions under the Act have been sustained even where the tribe would not itself have the authority to enforce its laws against the defendant. *See, e.g.,* United States v. Big Eagle, 881 F.2d 539, 540 (8th Cir. 1989).

²¹⁹ *See supra* note 94.

In states that follow more modern, multifactor choice-of-law theories, the path to application of tribal law may be, if anything, even clearer. In fact, once one overcomes the initial hurdle of translating choice-of-law concepts to the Indian-law context, certain of the “modern” approaches — in particular, interest analysis and the “most significant relationship” approach of the Second Restatement — lend themselves peculiarly well to cases involving tribal contacts.²²⁰

Consider first how theories incorporating interest analysis might apply. Suppose a tribe — call it Tribe A — enacts an ordinance requiring creditors to seek authorization from the tribe before repossessing property from a tribe member residing on the reservation. The governmental policy reflected in this rule is fairly clear: to protect the tribe members from arbitrary or unwarranted seizures of property. Further, the nature of the governmental policy underlying the ordinance does not change simply because, under *Strate* and *Hicks*, the tribe’s ability to enforce it against nonmembers in tribal court is limited. Tribe A, that is, likely has an equal interest in protecting its members from unfair seizures by members and those by nonmembers; it simply lacks jurisdiction to hold nonmembers accountable for their conduct in tribal court.

Now suppose that, under the law of State B, a secured creditor in general has the right to use self-help to repossess property on which a debtor has defaulted. Let us assume that State B has passed this law in order to protect the financial interest of in-state corporations that have agreed to sell goods on credit.²²¹ In any given case, however, this interest may or may not be implicated. If, for example, the original deal had been struck in State C between a Tribe A

²²⁰ In fact, such methods bear some similarities to courts’ current forum-centered approach. See Pearson, *supra* note 4, at 726 (noting that “[f]ederal [jurisdictional] law about Indians is a type of ‘interest analysis,’ a concept central to modern doctrine on Conflicts of Law”).

²²¹ This was in fact the case in *Belone*; New Mexico had adopted the Uniform Commercial Code, which gives secured parties the right to use self-help in repossessing property. See *Belone*, at 134 N.M. at 134-35 (citing N.M.

member and a State C corporation, and the Tribe A member sued in State B court for violation of the tribal statute,²²² State B would have no interest in applying its law, while Tribe A would have an interest in ensuring the security of its member's property. Under Currie's view, this would therefore constitute a "false conflict" to which Tribe A law should apply.

If the corporation were in fact located in State B, of course, a real conflict would exist — Tribe A's interest in protecting its members and State B's interest in protecting its creditors could not both be accommodated. Currie's approach would, in such a situation, apply forum law. However, other governmental-interest-based theories, such as Leflar's "better law" principle or Baxter's "comparative impairment" approach, might by contrast point toward tribal law. Whatever the outcome, however, each of these theories has the advantage of allowing state courts to step back from the case-allocation rules established by *Montana* and *Williams* to consider what stake the tribe actually has in any given case. Unlike *Montana* and *Williams*, that is, which give different weight to a tribe's interests in litigation depending on whether a tribe member is a plaintiff or defendant and whether the other litigant involved is Indian or non-Indian, governmental interest analysis allows state courts to take into account a tribe's legitimate interest in protecting the welfare of its members in all of these situations.

Approaches that rely on assessing the quantity and significance of contacts with various jurisdictions — the approach predominantly taken by, among other authorities, the Second Restatement — are also well suited to the tribal-law context. In state-to-state conflicts, these

Stat. Ann. 1978, § 55-9-503 (repealed 2001)).

²²² The original deal in *Belone* was in fact reached in Arizona, although the contract was later assigned to a New Mexico corporation. 134 N.M. at 134.

approaches are often derided as mere “contact-counting.”²²³ In the tribal-law context, however, where the people who reside on reservations often have varying levels of tribal affiliation, an approach that relies on assessing the number and quality of contacts may be the best way to establish whether a given resident, or a given case, has meaningful or only incidental connections with the tribe. A state court applying the Second Restatement might choose, for example, to apply state rather than tribal law in a tort action involving a tourist with no ties to the tribe whose negligent conduct occurred off the reservation, even if the injury itself occurred in Indian country. By the same token, in a case concerning a defendant who lives and works within reservation boundaries, who is married to a tribe member,²²⁴ and whose negligent conduct occurred on tribal land, the decision to apply tribal law may be a relatively easy one, even if the defendant is not technically a member of the tribe. Thus, unlike current doctrine, which often assigns cases to a state or tribal forum based on a *single* factor, such as the defendant’s identity, the Second Restatement approach allows the many factors that may be applicable in a case with tribal contacts to be given appropriate weight.

Finally, as the third section explores in more detail, exceptions common to most choice-of-law systems may also be particularly helpful in the tribal context. Many states, for example, permit courts to avoid application of a jurisdiction’s law, even if choice-of-law principles would otherwise call for it, on grounds that it is against public policy. While this exception has sometimes been criticized for giving courts too much discretion to make policy choices, it may be a useful escape device to allow state courts to avoid the application of tribal law in situations

²²³ See Shreve, *supra* note 165, at 190.

²²⁴ Many tribes, for example, may require a certain blood quantum for membership; spouses and relatives of tribe members may thus be ineligible, but are clearly members of the community. The facts of *Strate* illustrate this

where the matter at issue is clearly an internal tribal one and state-court involvement would offend tribal autonomy.

2. The Actual Experience of State Courts

On a theoretical level, therefore, there appear to be few obstacles to applying any of the major choice-of-law theories to cases involving tribal contacts. In practice, too, nontribal courts that have explicitly considered the issue have had relatively little difficulty in concluding that choice-of-law principles may under certain circumstances dictate the application of tribal law. In *Tempest Recovery Services v. Belone*,²²⁵ for example, a member of the Navajo Nation, living outside the boundaries of the reservation on allotted Indian land in New Mexico, defaulted on payments for a car purchased in Arizona. The installment contract provided that the “law of the state where the property is repossessed” would govern the transaction.²²⁶ Tempest, the car dealer, entered Belone’s allotted land, repossessed the car, and sued in New Mexico court for the outstanding balance. Belone counterclaimed for damages, citing a Navajo law providing that “[t]he personal property of Navajo Indians shall not be taken from the territorial jurisdiction of the Navajo Nation” unless authorized by Navajo judicial process or the purchaser’s written consent.²²⁷

The court first found that, under *Williams*, it had jurisdiction over Tempest’s claim (because it had arisen outside Indian country) and over Belone’s (because, while Belone’s cause of action had arisen in Indian country, Belone had chosen to bring his counterclaim in state court,

phenomenon; the plaintiff, while not a tribe member, had a husband and children who were.

²²⁵ 74 P.3d 67, 68 (N.M. 2003).

²²⁶ *Id.* at 69. The court found that this constituted, under New Mexico choice-of-law doctrine, an effective contractual choice of law; the court took care to note, however, that Navajo law contained an equivalent contractual choice-of-law provision.

as envisioned by *Wold*). Finding that the tribe had “territorial jurisdiction” over Indian country, the court concluded that a “choice-of-law issue ... follow[ed]” from the fact that Belone’s counterclaim had arisen there, and remanded the case to allow the district court to determine, “under choice-of-law rules,” whether New Mexico or Navajo law applied.²²⁸

The court’s reasoning was murky in some respects; the court apparently assumed that the parties had intended their contract to be governed by New Mexico choice-of-law principles, not New Mexico substantive law. Thus, the court applied New Mexico choice-of-law doctrine to determine where the counterclaim had arisen, but appeared to assume that, because that place was Indian country, Navajo substantive law should apply. Nonetheless, the more notable aspects of the case are the court’s decision to treat the Navajo Nation as a separate sovereign for choice-of-law purposes, and its conclusion that any part of Indian country should be treated as Navajo “territory” for purposes of determining where a claim had arisen. In other words, the court did not analyze the applicability of Navajo law by examining in detail whether the tribe would have had regulatory or adjudicatory authority over the transaction under the *Montana* test.²²⁹ Instead, it simply assumed, in essence, that any location within Indian country constituted a Navajo “place” for the purpose of determining, under state choice-of-law principles, whether Navajo law should apply.

²²⁷ *Id.*

²²⁸ *Id.* at 71 n.2 (citing Canby, *supra* note 17, at 214-15, for the proposition that “state courts applying normal choice of law principles should frequently apply tribal law to issues arising in Indian Country”).

²²⁹ In passing, the court did cite *Montana*, as well as an earlier New Mexico case, *Halwood v. Cowboy Auto Sales, Inc.*, 946 P. 1088, 1092 (N.M. App. 1997), in which the court had held that, on similar facts, the Navajo court would have civil jurisdiction over nonmembers. *Belone*, 74 P. 3d at 71-72.

Similarly, in *Brown v. Babbitt Ford, Inc.*,²³⁷ a case involving the same Navajo repossession law, an Arizona appellate court suggested that circumstances might exist under which comity would dictate application of tribal law under choice-of-law principles. Although the court ultimately concluded that the parties had made a valid contractual election of Arizona law,²⁴¹ it first considered at length whether Navajo law should be treated in the same manner as sister-state law for choice-of-law purposes. In so doing, the court left open the possibility that the principle of comity might under different circumstances oblige a state court to apply tribal law.²⁴⁴ Although the court questioned whether the Navajo Nation was genuinely an “independent sovereign jurisdiction,” it nevertheless noted that, applying principles of comity, Arizona had given effect to Navajo court decisions.²⁴⁵ As a result, the court concluded, “if a sufficient independent status exists in the Navajo Tribe for the courts of this state to recognize the validity of Navajo Tribal Court decisions, then, under principles of comity, like recognition should be extended to legislative enactments of the Navajo Tribal Council, provided, of course, such legislative enactments are not contrary to the public policy of this state.”²⁴⁶ Notably, the court did not limit potential application of tribal law to situations in which the tribe would have adjudicative jurisdiction. Instead, the court suggested that since Arizona courts treated the Navajo Nation as a sister sovereign for one purpose — enforcing the judgments of tribal courts — it should also treat it as a sovereign in other respects, such as the application of tribal law under choice-of-law principles.

²³⁷ 571 P.2d 689, 690 (Ariz. App. 1977).

²⁴¹ *Id.* at 690.

²⁴⁴ *Id.* at 695.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

Several federal cases have addressed nearly identical choice-of-law issues in the context of the Federal Tort Claims Act, which waives the United States's sovereign immunity for tortious acts that occur within the United States, specifying that courts should apply "the law of the place where the omission occurred." For many years, courts ignored the potential applicability of tribal law when an accident occurred in Indian country, applying state law to all issues even when tribal lands were involved.²³⁰ In 1999, however, a federal district court in *Cheromiah v. United States*²³¹ changed the terms of debate by applying tribal law to a malpractice suit arising from actions that occurred at a federally operated hospital on tribal lands.

The question at issue in *Cheromiah* was whether a New Mexico state cap on medical malpractice damages should govern a claim arising out of allegedly negligent treatment at an Indian Health Services facility on the Acoma reservation. Plaintiffs argued that Acoma tribal law, which had no damage cap, constituted the "law of the place where the omission occurred" under the federal statute. Departing from prior interpretations, the court agreed, rejecting the view that "law of the place" means exclusively "law of the state."²³²

²³⁰ See Pearson, *supra* note 4, at 696.

²³¹ 55 F. Supp. 2d 1295 (D.N.M. 1999).

²³² The *Cheromiah* court was not obliged to consider the more problematic situation described above, in which an action arose on an identifiably tribal "place" over which the tribe might be found to lack regulatory or adjudicative jurisdiction — such as a tort committed by a non-member defendant on tribal land. This is because the FTCA imposes an additional requirement, subjecting the United States to liability only "under circumstances where [it] ..., if a private person, would be liable." 28 U.S.C. § 1346 (b)(1). Because of this requirement, the court was obliged to undertake the analysis of whether the tribe would have jurisdiction over a private person in this situation under the principles of *Montana* and *Strate*. 55 F.Supp. 2d at 1302. In this case, because the United States had entered into a contract to provide medical services to the *Acoma*, the court concluded that the tribe would have had jurisdiction under *Montana*'s exception for consensual relationships. *Id.* at 1304. The court also found that because the hospital was the sole source of western medical care for nearly all *Acoma*, its alleged malpractice was more than an "isolated tort"; it had the potential to "jeopardize [the *Acoma*'s] very ability to survive as a people," thus triggering *Montana*'s second exception. *Id.* at 1305.

In another FTCA claim, *Louis v. United States*,²³³ a federal court, disagreeing with *Cheromiah*, concluded that Congress did not intend “place” in the FTCA to refer to Indian country. Interestingly, however, the court went on to suggest that, even if “law of the place” meant New Mexico law, tribal law could nonetheless potentially be applied to the claim under New Mexico choice-of-law principles.²³⁴ The plaintiff argued that, because New Mexico followed the *lex loci delicti* doctrine, tribal law should govern because the negligent conduct had occurred at a tribal hospital. Because the plaintiff had, however, ultimately died in a New Mexico hospital, the court found that the hospital was the place of the wrong and rejected this argument.²³⁵ However, by accepting that ordinary New Mexico choice-of-law principles applied, the *Louis* court explicitly left open the possibility that application of tribal law might have been proper had the plaintiff’s death occurred within the boundaries of Indian country.²³⁶

The application of choice-of-law principles to events in Indian country is thus often surprisingly straightforward. Conversely, state courts that have gone to great lengths to avoid application of tribal law have often found themselves tied in doctrinal knots. The South Dakota case of *Risse v. Meeks* is a stark example of the procedural tangles the current forum-centered

²³³ 54 F. Supp. 2d 1207 (D.N.M. 1999).

²³⁴ *Id.* at 1211.

²³⁵ As a choice-of-law matter, this was the correct result; *lex loci delicti* principles look to the place where the cause of action first became complete — i.e., where the injuries resulting from tortious conduct ultimately manifested themselves.

²³⁶ A few courts have rejected *Cheromiah*’s conclusion, relying instead on older precedents that treat “law of the place” as synonymous with “law of the state.” *See, e.g.,* Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267, 1268 (D.N.M. 2002) (citing various cases, none involving event that occurred on reservation lands) *Bryant v. United States*, 147 F. Supp. 2d 953, 956 (D. Ariz. 2000). Other courts to consider the issue have managed to avoid applying tribal law without directly rejecting *Cheromiah*’s reasoning. In *Williams v. U.S.*, the Fourth Circuit acknowledged conflicting decisions on the question of whether tribal law should be applied, but ultimately found that it need not decide the issue because no Cherokee law existed on the subject and “any tribal resolution would look, in these circumstances, to applicable federal and North Carolina law.” 242 F.3d 169, 176 (4th Cir. 2001).

regime can create.²³⁷ The case involved the non-Indian Risses, residing on off-reservation land in South Dakota, who brought a suit in state court against the Meeks, three members of the Ogala Sioux Tribe living on the reservation, after cattle bearing the Meeks' brands entered the Risses' property. The Risses alleged claims for trespass, for which they sought compensatory damages. Based on the Meeks' alleged failure to install a fence, the Risses also sought punitive damages for "willful, wanton, and reckless conduct."²³⁸

The South Dakota Supreme Court held that it had jurisdiction over the first claim, but not the second.²³⁹ The first action, for trespass, was based on damage to the Risse's land, which was "undisputably not Indian Country."²⁴⁰ The second cause of action, however, hinged on the Meeks' failure to construct a fence. Under South Dakota law, fences were a "fixture and part of the realty," and the claim therefore arose on Indian trust land, over which the court lacked jurisdiction.²⁴¹ In a thoughtful concurrence, Justice Konenkamp defended the result on the ground that tribes should have the right to set standards of conduct on tribal land. The state of South Dakota, he noted, lacked regulatory authority over "the construction and maintenance of a fence in Indian country"; thus, "imposing punitive damages for fencing decisions on the reservation allows the state to do indirectly what it would never do directly."²⁴² Instead, tribal courts should have the ability to decide questions pertaining to "the alleged wrongful use and possession of land located in Indian Country by a tribal Indian defendant"; to hold otherwise

²³⁷ 585 N.W. 2d 875, 876 (S.D. 1998).

²³⁸ *Id.* at 877.

²³⁹ *Id.*

²⁴⁰ *Id.* at 878.

²⁴¹ *Id.* at 878.

²⁴² *Id.* at 879.

would be to violate the principle that Indians possessed the sovereign right to “make and be governed by their own laws.”²⁴³

The force of Konenkamp’s argument, however, was entirely dependent on the view that the Risses’ lawsuit *could* be seen as asserting two entirely different claims — one relating to actions on state territory, and one concerning internal reservation matters. By contrast, the dissenting justices viewed the trespass as a single cause of action. A dissent by Justice Amundson²⁴⁴ emphasized that splitting the case would be an “odd procedure” because the punitive damages claim “merely constitute[d] an element of recovery on the underlying cause of action[,] . . . not an independent or additional cause of action which can be separated and stand on its own.”²⁴⁵ As Amundson noted, what the court was doing in effect was not splitting claims but splitting different sorts of evidence relating to a single claim — evidence relating to the claim for compensatory damages in state court and evidence relating to the “punitive damage portion of the claim” in tribal court.²⁴⁶ Notably, Amundson recognized that state law should not be imposed on the tribal defendants with respect to the punitive damages claim; instead, “[t]he conduct that may warrant punitive damages, if any, will have to be evaluated based on the rules or laws of the place where the conduct occurs, namely tribal land.”²⁴⁷

²⁴³ *Id.* (internal citations and quotation marks omitted).

²⁴⁴ Another dissenting justice, Sabers, saw things similarly, first observing that “[u]nder the general rule, an action for trespass to real property must be brought where the real property is situated,” thus necessitating that the trespass claim be brought in state court rather than tribal court. *Id.* at 881. In Sabers’s view, the punitive damages claim was “not a separate or independent cause of action,” but a “dependent, ancillary claim,” *id.* at 181; there was therefore no need to create a “multiplicity of suits” by forcing the Risses to split their claim between state and tribal court. *Id.* at 882.

²⁴⁵ *Id.* at 883.

²⁴⁶ *Id.* at 884.

²⁴⁷ *Id.* at 884 n.5.

As the dissenting justices appeared to recognize, choice-of-law analysis might have clarified the court's analysis and simplified decision of an essentially uncomplicated case. Had the court instead considered the option of applying Ogala Sioux law to the question of punitive damages, it would have been able to answer Justice Konenkamp's objection that the state should not be in the business of imposing standards of conduct in Indian country without the need to artificially separate the claim into two parts. In other words, Ogala Sioux standards of conduct would continue to govern how the Meeks fenced their farm, but the plaintiffs would not have been forced to split their cause of action between two forums.²⁴⁸

This case also illustrates how the rule of *Williams* places excessive emphasis on the form of a lawsuit. The decision to define the Risses' punitive damages claim as a separate cause of action meant that the state lacked power to assert jurisdiction over it, since under *Williams*, state courts are not permitted to hear suits against Indian defendants arising out of on-reservation transactions. By contrast, if the punitive damages claim had been defined as *part* of the Risses' state-law cause of action, *Williams* would presumably impose no barrier to allowing it to be heard in state court. Under *Risse*, therefore, whether the tribe had any say in setting standards of conduct for its members essentially hinged on a quirk of *South Dakota* procedure — that is, whether South Dakota regarded a particular legal demand as constituting two claims or one.

²⁴⁸This would have been, in fact, the only way in which claim-splitting could have been avoided, since the plaintiff could not have brought the entire suit in tribal court because South Dakota claimed exclusive jurisdiction over the trespass claim. Note as well that the result in this case also raises an inherent problem with claim-splitting: if part of a cause of action must be brought in state court and part in tribal court, what if the res judicata effect of the first result bars further proceedings in the second? Considering this problem, the *Risse* court concluded that, under South Dakota law, its proceedings would not have res judicata effect. *Id.* at 880. Since any further proceedings would be brought in Ogala Sioux court, however, it would presumably be necessary to consult Ogala Sioux law to determine whether the plaintiff could proceed further.

Even when a case does not does not present such complicated procedural conundrums, state courts' reluctance to apply tribal law may lead to unfair results and cause states to distort the way in which their choice-of-law principles are normally applied. In *Warm Springs Forest Products Inds. v. Employee Benefits Ins. Co.*,²⁴⁹ the Oregon Supreme Court considered a dispute between a non-Indian insurer and its insured, a tribal enterprise owned by the Confederated Tribes of the Warm Springs Reservation of Oregon. The insurer had allegedly made oral promises to the tribal enterprise, not reflected in the written policy, to rebate a portion of the premium for workers' compensation coverage.²⁵⁰ Under Oregon law, a promise by an insurer to rebate part of a workers' compensation coverage premium was invalid unless "plainly expressed" in the policy.²⁵¹ The tribal enterprise, however, argued that the court should apply tribal law, under which the promise was valid.

The Oregon Supreme Court held that Oregon law applied. While the policy did not contain an explicit choice-of-law provision, the court relied on two other provisions in the policy to suggest that the parties anticipated the application of Oregon law. First, the contract provided that changes in "classifications, or rating plans" affecting "the benefits provided by the Workman's Compensation Law" were to be stated in an endorsement to the policy. Because Oregon had a comprehensive law regulating insurance classifications and ratings, while Warm Springs law did not, the Oregon Supreme Court concluded that this provision could only refer to Oregon law.²⁵² In addition, the policy also referred to conditions under which promises to pay

²⁴⁹ 300 Ore. 617 (1986).

²⁵⁰ 300 Ore. at 619.

²⁵¹ 300 Ore. at 619 (quoting Or. Rev. Stat. § 746.035).

²⁵² *Id.* at 619.

policyholder dividends were “unlawful in Oregon.”²⁵³ From the existence of these two provisions, the Oregon Supreme Court concluded that Oregon law was intended to apply to the entire contract.²⁵⁴

In reaching this conclusion, the court seemed to rely as much on the fact that discovering the applicable tribal law might be burdensome as on any convincing evidence of the parties’ intentions. The tribal code provided that, in tribal court — the jurisdiction of which was limited to controversies involving \$3,000 or less — “matters that are not covered by this Code [or] the traditional customs and usages of the Tribe . . . shall be decided by the Court according to the laws of the State of Oregon.”²⁵⁵ Apparently daunted by the prospect of assessing whether any “traditional customs and usages” of the tribe differed from Oregon law, the court concluded that “Warm Springs is in no position to insist that the circuit court or the appellate courts must seek out and take judicial notice of all possible sources of laws or customs of the Confederated Tribes in order to determine whether or not these hypothetical laws or customs would enforce this insurance contract.”²⁵⁶

As the dissent pointed out,²⁵⁷ the court overstated the difficulties of searching out Warm Springs law — since, presumably, the court would have had to analyze not, as the majority intimated, the entire universe of Warm Springs contract law, but only Warm Springs law on the subject of oral promises. Indeed, the dissent urged, to find that the provision was enforceable under Warm Springs law, the court would *only* have had to investigate whether Warm Springs

²⁵³ *Id.*

²⁵⁴ *Id.* at 620.

²⁵⁵ *Id.* at 621.

²⁵⁶ *Id.* at 621.

²⁵⁷ *Id.* at 632.

had “some law of enforceable agreements which . . . has not been specifically modified by a statute like [the Oregon anti-rebate law].”²⁵⁸ More fundamentally, of course, as the dissent also pointed out, that finding Warm Springs law on a subject might be difficult was not a sufficient basis for concluding that the parties had not intended such law to apply.²⁵⁹

Notably, the majority explicitly rejected Warm Springs’s argument that Oregon’s choice-of-law principles dictated the application of tribal law. In the tribe’s view, application of Oregon law would “ha[ve] the effect of invalidating the rebate agreement, the main reason plaintiff bought the policy,” and should thus not be applied given that, according to the Second Restatement, “a contractual choice to apply foreign law which is contrary to the fundamental public policy of the place where the contract is made and performed will not be given effect.”²⁶⁰ Rejecting this argument, the court found that upholding the policy’s apparent choice of Oregon law would not be “contrary to the policy expressed in the tribal code’s reference to Oregon law in the absence of governing federal law or Indian written or customary law.”²⁶¹ This is, of course, circular logic, given that the tribal code followed Oregon law only where it did not conflict with tribal law, and the majority had refused to undertake the examination of whether any such contrary tribal law existed.

As *Warm Springs* illustrates, the unwillingness of state courts to apply tribal law can result in paternalistic assumptions about tribal goals and decisions that fail to advance — or even to consider — tribal interests. Instead of simply investigating what tribal law might be on what

²⁵⁸ *Id.* (internal citations and quotation marks omitted). The dissent also noted that modern trends allowed courts to take judicial notice of foreign law, rather than requiring it to be proved as a question of fact, and thus establishing the content of Warm Springs law might not be as difficult as the majority anticipated. *Id.* at 633-34.

²⁵⁹ *Id.* at 623 (Carson, J., dissenting).

²⁶⁰ *Id.* at 622 (citing Restatement, Second, Conflict of Laws § 187(2)(b) (1971)).

was, in this case, a fairly narrow point, the majority rejected the possibility out of hand as too difficult.²⁶² Further, in order to reach this conclusion, the court had to both ignore its usual choice-of-law doctrine and adopt an aggressive — and likely incorrect — interpretation of the evidence before it. By contrast, as the dissent pointed out, had the court simply applied its normal contractual choice-of-law principles consistently, it would likely have had to investigate only a narrow point of Warm Springs law. Such a result arguably would have been both simpler and fairer.

3. Advantages of the Choice-of-Law Approach

The preceding section has suggested some of the ways in which a choice-of-law approach would often be fairer, more predictable, and more efficient than the current way in which most states treat cases with tribal contacts. The advantages of a choice-of-law approach, however, extend much more broadly. Most fundamentally, such a practice would acknowledge a growing reality: that the extent of tribal adjudicative and regulatory jurisdiction is frequently much narrower than the scope of what most courts would acknowledge as tribes' legitimate interests. For example, when nonmembers are responsible for torts whose effects are felt within a reservation's borders, all members of the tribe may feel that their safety and security has decreased. The tribe, however, is likely to lack authority either to regulate the nonmember's behavior directly or to require the matter to be heard in tribal court. Allowing state courts to apply tribal law in such circumstances has the potential to promote tribal autonomy and self-

²⁶¹ 300 Ore. at 623.

²⁶² While the interests of tribes and tribal litigants are of course not always identical, there was no indication that the interests of the tribal corporation might differ from those of the tribe.

determination by providing a way in which tribal interests can be taken into account.²⁶³

Relatedly, choice-of-law analysis has the potential to introduce a welcome element of territoriality into state courts' approach to claims arising on Indian reservations. As the Supreme Court's understanding of tribal legislative authority has increasingly focused on tribal membership rather than on the boundaries of reservations or of Indian country,²⁶⁴ tribes' ability to influence events that occur within their borders has been severely weakened. Yet borders and a sense of place remain central to the way most people conceive of sovereign nationhood, and decisions based on territory foster a greater sense of certainty and predictability.²⁶⁵ Applying a choice-of-law approach that contains a territorial component would heighten the significance of whether or not an event occurs within "Indian country," and thus allow tribal sovereignty to have a surer geographical reach.

More symbolically, state-court use of choice-of-law principles in the tribal context would be a gesture of comity, allowing state courts to treat tribal law in the same manner they do the law of other coequal sovereigns. Such a gesture of respect could help build more trust between state and tribal courts, facilitating cooperation in other areas where state-tribal jurisdictional overlap exists — such as the management of parallel state and tribal proceedings or the enforcement of tribal orders in state court.

Other advantages of applying tribal law are more practical. Choice-of-law methodologies generally allow courts some flexibility to consider the facts of the case in an individualized way, a quality particularly helpful in sorting out the tangled mixture of state and tribal contacts that

²⁶³ For a more extensive consideration of this perspective, see *Cheromiah v. United States* 55 F. Supp. 2d 1295 (D.N.M. 1999).

²⁶⁴ See Canby, *supra* note 11, at 190-92.

often characterizes state-court cases involving Indians. Applying choice-of-law principles, a court could, for example, decide that, of the plaintiff's several related claims, some should be governed by state law and some by tribal law. By contrast, under a scheme that assumes each forum will apply its own law, a plaintiff whose case involves both state and reservation contacts is compelled to split his case between state and tribal court if she wants tribal law to apply to *any* of her claims.

Further, because the choice of which law to apply is not a question of jurisdiction, it can be made in combination with a determination of the merits of the case. By contrast, if jurisdiction is uncertain, the court will often be forced to engage in an extensive, fact-specific inquiry before it has even established that it has the power to hear the case. In particular, a choice-of-law approach that looks to the number and quality of contacts between a defendant and the tribe simply has more inherent flexibility than a forum-centered approach, allowing courts to consider often-complex issues (such as the degree of affiliation between a given litigant and a tribe) in a more precise, case-by-case manner.

Encouraging state courts to apply tribal law in situations like the ones described has the potential to create more consistent results and reduce the possibilities for forum-shopping. Under a solely forum-based approach, whether state law or tribal law applies to a case may be dictated by who sues whom first, and therefore whether the case is assigned to state or tribal court. Under a choice-of-law approach, however, which law applies is determined by factors such as the place

²⁶⁵ See Brilmayer, *supra* note 192.

of relevant events and the domicile of the litigants²⁶⁶ that remain constant regardless of the configuration of the lawsuit.

Finally, an advantage of interest analysis and Second Restatement-type approaches in particular would be to allow courts to separate the interest of tribal litigants from the interest of the tribe itself, and to allow both to be accorded their proper weight. Under the current, forum-based approach, that is, the Supreme Court has rarely considered whether the tribe as a whole might have a stake in a given case that differs from that of the individual litigants. In *Fisher*, for example, the Court concluded that, because tribal adjudication of cases involving internal tribal matters would strengthen tribal independence, it was also in the best interests of individual Indian plaintiffs. In *Wold I* and *II*, the Court took this equation in the other direction, assuming that what was in the best interest of Indian litigants — ready access to state courts — was also in the best interest of tribes.

Of course, in many cases, there may be little difference in practice between tribal and litigant interests. For example, cases involving tribal contacts that appear in state court often involve tribal corporations that are closely linked to the tribal government. Nonetheless, it is possible to imagine cases where litigant and tribal interests might diverge. A given Indian litigant, for example, might prefer state law because it is more favorable in a certain situation, while the tribe might favor a tribal ordinance intended to repair relationships between Indian litigants.

²⁶⁶ Note, in particular, that a court considering which law to apply under choice-of-law doctrine can consider the domicile of both plaintiff and defendant under the particular circumstances of the case. This in contrast to the rule of *Williams*, where the presence of a tribal defendant may cause the case to be sent to tribal court but the presence of a tribal plaintiff does not.

Under current procedure, the interests of Indian litigants will be by default given greater weight than the interests of the tribe simply because litigants generally have more control over which court hears the case. Where concurrent state and tribal jurisdiction exists, for example, Indian plaintiffs have a choice about where to sue; while defendants have less obvious control, they may be able to shape the litigation in subtler ways — for example, by deciding whether or not to press *Williams v. Lee* objections when a case against them is brought in state court. Choice-of-law approaches that allow for some consideration of governmental interests would help to redress this balance by allowing the tribe’s interests to be taken into account as well.

In certain circumstances, application of tribal law could benefit state courts as well as tribes. A rule like “law of the place” is simple to apply, and state courts might prefer navigating basic choice-of-law principles to negotiating the complicated jurisdictional patchwork of *Montana*. A state court, therefore, might choose to treat a tribe exactly as it does a sister state for choice-of-law purposes in order to foster ease of administration and predictable results. Further, while states and tribes have historically competed for authority over Indian country, the judicial branches of both sovereigns have been moving steadily toward greater cooperation. Many state and tribal courts now enjoy friendly relations.²⁶⁷ State courts might, therefore, make the comity-based decision to treat tribes as ordinary sovereigns for choice-of-law purposes in order to help foster the mutually beneficial relationships many state and tribal courts have cultivated.

²⁶⁷ To choose just one example, Carol Tebben describes a Wisconsin county where “the chief judge of the state judicial district travels voluntarily to the Lac du Flambeau reservation, about forty-five miles each way, to hold court at the tribal court for the convenience of tribal members.” Carol Tebben, *Trifederalism in the Aftermath of Teague*:

III. Answering Objections to the Application of Tribal Law in State Court

Despite the apparent advantages described above, many state courts have been reluctant to apply tribal law under choice-of-law principles, and some Indian-law scholars have spoken against the practice. This Part considers the arguments, both doctrinal and policy-based, that courts and commentators have made against the application of tribal law in state courts. The first section focuses on fairness to nonmembers, considering whether the application of tribal law in state court might be limited by constitutional restrictions or principles of federal Indian law that limit tribal sovereignty. The second section focuses on whether state-court application of tribal law is in tension with Supreme Court cases protecting tribal autonomy. Finally, the third section considers more broadly whether state-court application of tribal law should be discouraged because it is impractical or not in tribes' best interests.

A. States' Authority to Apply Tribal Law To Nonmembers of the Tribe

The first question that must be addressed about the extent of states' authority to apply tribal law is whether tribal law may validly be applied to nonmembers. After all, in the ordinary course of events, litigants who are not members of a tribe cannot be made defendants in tribal court; further, in most cases, the tribe cannot regulate their conduct. In light of these facts, do Supreme Court precedents permit tribal law to be applied to nonmembers at all?

In that respect, it is important to note that decisions about whether and how to apply tribal law in state court are, in the first instance, questions of state law. Modern courts and commentators have definitively rejected the beliefs of Beale and other early choice-of-law

The Interaction of State and Tribal Courts in Wisconsin, 26 Am. Indian L. Rev. 177, 188-89 (2001).

theorists that a right is “created” when a cause of action becomes complete.²⁶⁸ A state court’s decision to apply state law, therefore, chooses to do so by its own inherent authority, not the tribe’s. Thus, in the absence of any preempting federal dictate, states should be free to apply tribal law if they choose to do so.

Further, the Supreme Court has held that a state court’s power to apply any particular state’s law to the dispute before it is restricted only by the modest limits imposed by the Due Process Clause. In the key case on the subject, *Allstate Ins. Co. v. Hague*,²⁶⁹ a woman whose husband had been killed in a motorcycle accident sued in Minnesota court seeking a declaration that her late husband’s insurance policies could be “stacked” pursuant to Minnesota law; the insurer argued that Wisconsin law should govern the question.²⁷⁰ Although the insurance policy had been delivered in Wisconsin, the accident had occurred in Wisconsin, and all persons involved in the accident were Wisconsin residents when it occurred, the Minnesota Supreme Court nonetheless determined that Minnesota law should apply.²⁷¹

The Supreme Court upheld this decision, finding that the Minnesota courts’ decision satisfied the basic test the Due Process clause imposed on state choice-of-law decisions — that the choice be “neither arbitrary nor fundamentally unfair.”²⁷² This test, the Court indicated, would be satisfied if the state whose law was applied had any “significant ... aggregation of

²⁶⁸ J. Beale, *Treatise on the Conflict of Laws* s 73 at 105 (1916) (“When a right has been created by law, this right itself becomes a fact A right having been created by the appropriate law, the recognition of its existence should follow everywhere”).

²⁶⁹ 449 U.S. 302 (1981).

²⁷⁰ *Id.* at 305.

²⁷¹ *Id.* at 306. The Minnesota Supreme Court followed Leflar’s approach, placing particular weight on Leflar’s “better rule of law” factor — which, the court concluded in this case, pointed in the direction of applying the Minnesota rule permitting stacking. *Id.* at 306-07.

²⁷² The Court in fact considered the question under both the Full Faith and Credit Clause and the Due Process Clause; the test, however, is identical for both. *See id.* at 308 n.10. Because the Full Faith and Credit clause has not

contacts, creating state interests, with the parties and the occurrence or transaction.” As applied in *Hague*, this requirement did not prove to be an onerous one. As the Court noted, Hague had just three contacts in Minnesota; he worked in Minnesota²⁷³; Allstate did business in California²⁷⁴; and Hague’s widow had married a Minnesota resident and moved to Minnesota prior to filing the lawsuit.²⁷⁵ Nonetheless, the Court concluded that this slim collection of contacts — none of which was directly related to the accident, and one of which arose well after the events at issue — was sufficient to satisfy due process requirements. The Court further observed that states have wide scope to choose which choice-of-law system to apply, noting that “a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”²⁷⁶

While *Hague* concerned a forum’s attempts to apply its own law, the Court gave no indication that its holding was limited to application of forum law. Thus, presumably *Hague* also sets the constitutional boundaries for state-court application of tribal law. *Hague* would thus appear to indicate that, so long as a litigant has contacts with the tribe or his actions have some effect on it, there should be no constitutional obstacle to the application of tribal law.

One objection to this analysis might be that, because of the more limited nature of tribal sovereignty, a higher constitutional threshold exists for the application of tribal law. The Court has, for example, weighed concerns of procedural fairness in determining the extent of tribes’

generally been found to apply to tribes, this discussion considers the test only in terms of the Due Process Clause.

²⁷³ *Hague* also commuted to work in Minnesota, although the accident had not occurred during his commute. *Id.* at 314-15.

²⁷⁴ *Id.* at 317.

²⁷⁵ *Id.* at 318-19. While acknowledging that a post-accident move would be “insufficient in and of itself” as a basis for the application of a given state’s law, the Court nonetheless found that “such a change of residence was [not] irrelevant.” *Id.* at 319.

²⁷⁶ *Id.* at 307.

adjudicative jurisdiction.²⁷⁷ Thus, it is possible that the application of tribal law to nonmembers might raise special due process concerns.

Yet while it is certainly true that the Supreme Court has not treated tribes identically to states or other sovereigns, the Court has given no indication that this distinction is relevant for choice-of-law purposes; indeed, the Court has occasionally suggested situations in which the application of tribal law might be appropriate.²⁷⁸ In matters involving the law of foreign nations, states have generally dealt with conflicts of law in the manner that their usual policies dictate, notwithstanding the fact that such choices may have broader implications for foreign relations or other federal policies.²⁷⁹ Thus, even where some federal interest may be present, choice-of-law decisions have normally been treated as an internal state matter, one with which federal courts have not attempted to interfere as long as basic due process requirements are met. The same result, therefore, should also apply in the tribal context. Indeed, this is the result courts appear to have reached in practice; courts that have considered the peculiar attributes of tribal sovereignty in deciding whether to apply tribal law have ultimately concluded that tribes should be treated in the same manner as other sovereigns.²⁸⁰

Although application of tribal law by state courts thus seems unlikely to raise constitutional questions in the vast majority of cases, the question of whether state choice-of-law decisions might ever be preempted by federal Indian-law principles is a more uncertain one. The Supreme Court has never explicitly discussed the relationship between choice-of-law theory,

²⁷⁷ See, e.g., *Oliphant*, 435 U.S. at 194 (expressing concerns about non-Indians being tried by all-Indian juries); *Strate*, 520 U.S. at 459 (suggesting that nonmembers would be unduly burdened by having to defend a suit in an unfamiliar tribal court).

²⁷⁸ *Wold*, 467 U.S. at 889.

²⁷⁹ See *Yahoo! Inc.*, *supra* note 94, slip op. at 434-35.

with its territorial emphasis, and the more uncertain boundaries of tribal jurisdiction sketched by *Montana*. As detailed in the preceding discussion, the Court has generally — though not universally — assumed that state courts will apply state law, even as it has at other points suggested that state courts might choose to apply tribal law, or even be required to do so. Therefore, even though the way in which state courts resolve conflicts between the law of other jurisdictions is ordinarily a matter of state law, principles of federal Indian law might dictate different results where tribal law is concerned. In other words, the Court’s statements in *Montana* and successor cases about federal limitations on tribal sovereignty might preempt a state court’s decision to treat a tribe on an equal footing with other sovereigns.²⁸¹ Under *Montana*, therefore, state courts might be forbidden from applying tribal law at all — or, at a minimum, from applying it to disputes that the tribe would not have authority to regulate directly.

Such a conclusion, while tempting, would be incorrect. *Strate* and *Hicks*, read carefully, do not explicitly provide that state law must apply, or that tribal law may not apply, to nonmembers whose conduct has an effect on the well-being of tribes. It is clear from *Montana* that tribes may not tax or regulate nonmembers’ use of their private land except in special circumstances, and it is clear from *Strate* that a tort claim against a nonmember may not be brought in tribal court, at least if the tort did not occur on tribal trust land. But the Supreme Court has never held that, for example, a tribal code provision imposing liability for negligent conduct on the reservation should have *no* relevance of any kind to nonmembers. On the contrary, the Court has recognized that tribes have some stake in the conduct going on within

²⁸⁰ See, e.g., *Babbitt Ford*, 571 P.2d at 695.

²⁸¹ The court in *Babbitt Ford*, 571 P.2d at 695, considered a version of this issue in deciding whether to accord a tribe coequal sovereign status.

their borders, even as it has held that this interest is generally outweighed by nonmembers' interest in not being subject to the authority of tribal courts.²⁸²

Even in the handful of states on which Congress has conferred jurisdiction over Indian country pursuant to P.L. 280, a case can be made that no direct federal barrier exists to the application of tribal law, at least in certain circumstances, to tribal disputes brought in state court. This is true notwithstanding the fact that *Bryan v. Itasca County*,²⁸³ a case that rose from the aftermath of 1950s assimilationist politics, provides arguable support for the principle that state courts hearing tribal disputes should, at least in P.L. 280 states, apply state law. In *Bryan*, the Court considered the scope of civil jurisdiction over Indian country in states that were included in P.L. 280. While Congress's primary concern in enacting P.L. 280 had been to give states a role in punishing criminal conduct on reservations, the statute also included hastily drafted civil jurisdiction provisions.²⁸⁴ These provided that the participating states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action," and further that the "civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."²⁸⁵ Taking the position that this

²⁸² See *Strate*, 520 U.S. at 459. This is particularly true because the Court has refused to rule out the possibility that tribal regulatory powers might exceed tribal adjudicative powers.

²⁸³ 426 U.S. 373 (1976).

²⁸⁴ It is often believed that Congress's primary motivation in passing P.L. 280's was to give states a role in punishing criminal conduct on reservations, while its civil jurisdiction provisions were something of an afterthought. See *Bryan*, 426 U.S. at 379 (citing Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 541-542 (1975)).

²⁸⁵ See 28 U.S.C. § 1360(a).

provision authorized the application of state law within Indian country,²⁸⁶ Minnesota sought to collect personal property tax from a Chippewa Tribe member living on the reservation.²⁸⁷ The *Bryan* Court held that the state lacked authority to do so. In what is generally hailed as an important victory for tribal independence, the Supreme Court narrowly construed P.L. 280's somewhat cryptic civil jurisdiction provisions, holding that the jurisdiction granted states was solely adjudicatory and did not permit tribes to be "subordinated to the full panoply of state regulatory powers."²⁸⁸ Instead, the Court found, the purpose of the civil-jurisdiction provisions was simply to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes."²⁸⁹

Bryan's central holding enabled tribes to preserve a core of distinct regulatory authority even in P.L. 280 states, and has rightfully been hailed as a masterly decision by a Court that wished to avoid giving states wholesale authorization to regulate events within Indian country while at the same time interpreting P.L. 280 in a way that its text could plausibly support.²⁹⁰

Bryan's more problematic aspect, however, is its assumption that state law would apply to state-court proceedings involving Indians in P.L. 280 states. Although the Court did not specifically

²⁸⁶ The extent to which states can tax transactions by tribe members or otherwise regulate conduct within Indian country is a complex issue in its own right. In general, states do not lack all authority to regulate in Indian country, but their powers are sharply limited. States generally do not have power to tax on-reservation activity or to regulate the use of tribal lands, although they may have such authority over nonmembers on fee lands within a reservation. See Canby, *supra* note 17, at 270-76. In P.L. 280 states, state "prohibitory" state law may apply in Indian country, but state "regulatory" law generally does not. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987).

²⁸⁷ 426 U.S. at 375.

²⁸⁸ *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

²⁸⁹ *Id.* at 384.

²⁹⁰ See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 430-432 (1993) (describing the Court's "artful" construction of "one of the most assimilationist laws in American history").

discuss the issue, most commentators have assumed that, under *Bryan*, state law can and should apply to disputes brought pursuant to P.L. 280.²⁹¹

Nevertheless, it would be a mistake to interpret *Bryan* as setting forth a more general principle that state law should apply to tribal matters in state court. It is first important to note that the *Bryan* court was dealing with a specific piece of legislation, one that does not apply in many states, such as New Mexico, with a large number of tribal disputes. Because of the sweeping language of P.L. 280, it is hard to see how the Court could have interpreted P.L. 280 any more narrowly than it did. P.L. 280 plainly gives state law, under some circumstances, the same “force and effect within . . . Indian country” as it has in the state at large; by limiting the such laws’ “force and effect” to the adjudicative context, the Court ensured that state law would not be generally applicable to tribes — and further that it would apply only when tribal litigants, by bringing cases to state court, affirmatively elected it. Ultimately, therefore, far from establishing a broad mandate for the application of state law by state courts, the Court ensured that P.L. 280’s commands would have the narrowest possible effect.

Given this, it is possible to interpret *Bryan* to allow the application of tribal law under limited circumstances to tribal disputes even in P.L. 280 states. Under *Bryan*, P.L. 280 could be interpreted to allow states to apply their “whole law”— that is, in choice-of-law terminology, their choice-of-law principles as well as their substantive law.²⁹² If states applied their usual

²⁹¹ Canby, *supra* note 17, at 226. See also *Cabazon Band*, 480 U.S. at 208 (suggesting that, under P.L. 280, state law would apply in “private civil litigation”). Note that even when plaintiffs assert state causes of action, courts in P.L. 280 states may be required to engage issues of tribal law. See, e.g., *Turner v. Martire*, 82 Cal. App. 4th 1042, 1054-55 (2000) (finding that plaintiffs could assert state-law tort claims against tribal officials against whom plaintiff had asserted state-law tort claims were not immune because they had not shown that they were acting within the scope of their official duties under tribal law).

²⁹² See Pearson, *supra* note 4, at 725 (arguing that, in some cases, courts directed to apply a state’s “whole law” might ultimately apply tribal law as a result of that state’s choice-of-law principles).

choice-of-law principles to P.L. 280 actions, such principles could ultimately dictate the application of tribal law to the given action. Though Congress may not have explicitly foreseen this result, it is difficult to argue that P.L. 280 expressly forbids it, since state choice-of-law principles are as much laws of “general application” as tort or contract law.²⁹³ Because *Bryan* reaffirms tribes’ continuing regulatory jurisdiction over Indians in Indian country, there is a particularly strong case that application of tribal law in P.L. 280 states is permissible when such law is applied to govern events and transactions that the tribe would have authority to regulate, or to contracts in which the application of tribal law is a negotiated term.²⁹⁴ Thus, even when a case is brought pursuant to P.L. 280 jurisdiction, the possibility of applying tribal law may not be entirely foreclosed.

B. Application of Tribal Law and Federal Principles of Tribal Autonomy

While the *Montana* line of cases has been aimed at shielding nonmembers from unwanted assertions of tribal jurisdiction, Supreme Court case law has also had another, arguably more important goal: protecting the rights of tribes against states. Thus, as *Williams* and *Fisher* indicate, some matters implicating tribes are simply inappropriate for adjudication in state court. Could the same be true, under any circumstances, with regard to state-court decisions to apply tribal law? In other words, is it possible that the application of tribal law might, in some cases, be preempted under federal Indian law on the grounds that it conflicts with tribal sovereignty?

²⁹³ See *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941) (finding that choice-of-law principles are substantive state law).

²⁹⁴ Notably, notwithstanding the fact that Oregon is a P.L. 280 state and even though the court ultimately decided to apply state law to the tribal contract at issue, the court in *Warm Springs* never cited P.L. 280 as a reason to do so, and indeed appeared to suggest that the parties to a contract could validly elect to have tribal law apply under appropriate circumstances. See 300 Ore. at 623.

As a preliminary matter, it bears noting that the application of *state* law to events that concern tribe members or that take place on reservation always interferes, to a greater or lesser extent, with both of *Williams*'s imperatives — that is, that tribes be permitted both to “make” their own laws and to “be ruled by” them. Because the court’s decision becomes a binding state precedent in which the tribe has no say, the process of adjudication interferes with tribes’ ability to “make” their own laws. Moreover, when state law is applied to reservation matters, it also interferes with tribes’ ability to “be ruled by” the laws they make, because a sovereign other than the tribe determines the law to which tribe members will be subject.

The equation becomes more complicated, however, when a dispute is heard in state court, but tribal law applies. It is certainly true that, in some cases, the application of tribal law by a state rather than a tribal court has the potential to undermine the principles announced in *Williams*. Where a given tribe’s judicial values are fundamentally incompatible with state-court adjudication — as may be the case, for example, with tribes using nonadversarial dispute resolution processes — allowing a state court to hear a case may inevitably distort and dilute tribal law, interfering with tribes’ right to make law in the manner they might wish. Similarly, where a tribal forum is available but a case is brought in state court, the effect of allowing the state court to apply tribal law may be to undermine the tribal court’s authority. In such situations, allowing a state rather than a tribal court to apply tribal law is certainly in tension, if not outright conflict, with the underlying principles of *Williams*.

This line of reasoning, however, rests on the broad assumption that a tribal forum is both available and a viable alternative to state court. As has been discussed, however, many cases exist in which a tribe has legitimate interests in the outcome of a case, but a state court is, for

jurisdictional or practical reasons, the only forum in which the dispute can be heard. In such cases, application of tribal law in state court *promotes* tribes' right to "be ruled by" the laws they make, by allowing tribes to expand their sphere of influence and ensure that tribal standards of conduct are applied to events that might affect them. In other words, where a tribal forum is not readily available, the application of tribal law should not be seen as usurping the role of the tribal court, but instead as displacing state law that would otherwise apply. Because application of state law to tribal matters rarely furthers tribal self-rule, application of tribal law in such circumstances is in keeping with *Williams*'s broad principles.

Thus, a more productive way of looking at *Williams* may be as a case that is relevant to decisions about which law should apply to a case rather than exclusively to decisions about which forum should hear it. That is, once state-court jurisdiction is already established, either because the Supreme Court has mandated it or an Indian litigant has chosen it, the reasoning of *Williams v. Lee* should weigh in favor of, not against, the application of tribal law.²⁹⁵ Such an interpretation would address *Williams*'s key concerns — ensuring that tribal law is applied to tribal matters and that Indian defendants are not required to appear in state court against their will. Yet it would also acknowledge the reality that many cases with tribal contacts are heard by state courts, and that the tribe has a continuing state in those cases.

²⁹⁵ A more radical re-understanding of *Williams* might be to view it as *exclusively* as a choice-of-law case mandating that tribal law be applied to reservation-centered transactions. In other words, as long as the tribal defendant does not object to adjudication in state court, state adjudication would be permissible so long as tribal law applies. Under such a reading, *Williams* could also be understood as giving Indian defendants (or, perhaps, the tribe itself) a power of removal to tribal court if one were available. Since *Williams* remains one of the few affirmations of tribal sovereignty that is still good law, any revision of its holding carries some danger to tribes. This approach would, however, acknowledge the reality that some state courts have pushed the limits of what *Williams* allows — by, for example, deciding claims by and against tribe members so long as some relevant conduct took place off the reservation. See Reynolds, *supra* note 6, at 549.

A subtler problem in applying tribal law in state court involves the implication of precedents that the Court has developed in the federal-court context. As the previous section has discussed, the Court has generally assumed that state and tribal courts operate in separate spheres and will apply separate law — while also acknowledging that, under certain circumstances, state and tribal courts might have concurrent jurisdiction over the same case. The Court has given state courts little guidance in how to negotiate areas of overlapping jurisdiction with tribal courts — what to do, for example, if a litigant files suit in tribal court and then proceeds to file another suit, arising out of the same facts, in state court.²⁹⁶

Nonetheless, in cases where the jurisdiction of tribal and *federal* court arguably overlaps, the Court has held that, where arguable tribal-court jurisdiction exists, a plaintiff can sue in state court only after pursuing tribal remedies, including any possible appeals. Although the extent of tribal jurisdiction is a question of federal law, the Court held in *National Farmers Union v. Crow Tribe*²⁹⁷ that tribal courts must have the opportunity to determine their own jurisdiction first; only after a final pronouncement from the tribal courts may federal courts engage in a final level of review to determine whether the tribal exercise of jurisdiction was proper.²⁹⁸

In *Iowa Mut. Ins. Co. v. LaPlante*,²⁹⁹ the Court clarified that the exhaustion principle extended even to cases in which federal jurisdiction was founded in diversity. In such cases, the court found, “unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs.”³⁰⁰ Further, the

²⁹⁶ This situation is most likely to arise in P.L. 280 states.

²⁹⁷ 471 U.S. 845 (1985).

²⁹⁸ 471 U.S. at 857.

²⁹⁹ 480 U.S. 9 (1987).

³⁰⁰ *Id.*

Court observed, “[a]djudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.”³⁰¹

Various state court cases have considered the implications of *Crow Tribe* and *LaPlante* for concurrent state/tribal jurisdiction.³⁰² State courts have differed on whether *Crow Tribe* and *LaPlante* require state court abstention where states and tribes have concurrent jurisdiction over a case.³⁰³ On the one hand, *LaPlante* makes clear that tribal courts are to be the primary expositors of tribal law, and that adjudication by nontribal courts to some extent always impinges on tribal sovereignty. On the other hand, *LaPlante* does not speak at all to the issue of state jurisdiction, and other Supreme Court cases, from *Bryan* to *Wold*, contemplate the exercise of concurrent state jurisdiction under certain circumstances without articulating an equivalent exhaustion principle.

In considering the issue, it is important to note, first, that *Crow Tribe* and *LaPlante* both dealt a situation in which a suit was already pending in tribal court and the tribal court’s jurisdiction was thus directly challenged. Although the holding of these cases was not limited to that situation, some courts have concluded that comity-based concerns about interference with another sovereign’s proceedings are less compelling when no tribal suit has yet been filed — even in situations where the tribal court might hypothetically have jurisdiction over the case.³⁰⁴ In such cases, that is, state-court adjudication might indirectly undermine the power of tribal courts to pronounce on reservation affairs, but it does not operate as a direct attempt to strip the

³⁰¹ *Id.*

³⁰² In a particularly lengthy and scholarly opinion, the Connecticut Supreme Court reached the conclusion that state adjudication is permissible in situations where it would not interfere with ongoing tribal proceedings. See *Drumm v. Brown*, 716 A.2d 50, 52-53 (Conn. 1998).

³⁰³ See *id.* (collecting cases).

tribal court of its authority. While the underlying principles of *LaPlante* counsel caution in any case where concurrent tribal jurisdiction exists, an argument can be made that a state court should, in limited circumstances, have discretion to hear such cases — if, for example, the state forum is strongly preferred by an Indian plaintiff.

An even stronger argument can be made that a case in which a state court has exclusive jurisdiction should be regarded differently from one in which it is exercising concurrent jurisdiction — and thus potentially competing with tribal courts. Indeed, if a tribal court is not available or clearly lacks jurisdiction over a case, the exhaustion principle of *Crow Tribe* and *LaPlante* cannot apply literally — since there is, in effect, nothing to exhaust. In this regard, it is worth noting that the Supreme Court has retreated from much of the reasoning on which *LaPlante* rested.³⁰⁵ The Supreme Court’s recent case law has not only narrowed the scope of tribal jurisdiction, but ensured that tribal and state jurisdiction will remain closely linked in a way that tribal and federal jurisdiction are not. As *Strate* and *Hicks* make clear, state courts have a role to play in adjudicating tribal disputes, picking up where tribal jurisdiction ends to provide a forum in which tribe members’ claims against nonmembers can be heard.³⁰⁶

As the Court has limited tribal courts’ power to adjudicate cases involving nonmembers, it has become virtually inevitable that many cases with substantial tribal contacts will be heard in state court. Thus, the main objective of *LaPlante* — to ensure that tribal courts have the primary

³⁰⁴ See *id.*

³⁰⁵ See *Strate*, 520 U.S. at 444; Reynolds, *supra* note 6, at 566.

³⁰⁶ See *Strate*, 520 U.S. at 459.

role in interpreting tribal law — is no longer achievable except at the cost of expanding state law’s applicability to tribal matters.³⁰⁷

The aim of this discussion is not, of course, to argue that, simply because the Supreme Court has retreated from its high point in protecting tribal sovereignty, state courts should heedlessly decide questions of tribal law without regard to the impact of such a practice on tribes.

But as the preceding sections have described, attempts to honor the underlying principles of *LaPlante*³⁰⁸ must take into account the reality that, in many cases, tribal law must be applied in state court or not at all. Therefore, while *LaPlante* remains an important guidepost for state courts addressing tribal-law issues, it should not operate to bar entirely state court consideration of tribal law.

C. Tribal Law and Tribal Interests

That Supreme Court precedent does not broadly prohibit the application of tribal law by state courts does not, of course, mean that such a practice is always in the best interests of tribes.

Many tribes and advocates for tribal rights have been skeptical about application of tribal law outside tribal forums and uneasy about the capacity of outsider courts to understand Indian cultural norms. Indeed, some commentators have argued that application of tribal law outside

³⁰⁷ Many Indian-law scholars have, of course, sharply criticized the Supreme Court’s post-*Montana* caselaw as unduly restricting tribal sovereignty in ways that lack historical or textual basis — a position with which the author of this article is sympathetic. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1 (1997). Defenders of the post-*Montana* state of affairs, however, might counter that *Montana* serves the important function of protecting the settled expectations and due process rights of nonmembers. Whatever the merits of *Montana*, however, its holding is likely here to stay; in fact, the recent tendency of the Court has been to expand its reach. It is important to emphasize, therefore, that both detractors and supporters of *Montana* can potentially approve of wider state-court application of tribal law. Those who dislike *Montana* can embrace this outcome as a means of restoring some of the tribal influence *Montana* stripped away; supporters should find it unobjectionable because such adjudication would take place in a forum bound (as tribal courts are not) to respect nonmember litigants’ constitutional rights.

³⁰⁸ Indeed, the *LaPlante* Court could make the observation, accurate in light of then-existing law, that notwithstanding the restrictions on tribal criminal jurisdiction the Court had imposed in *Oliphant*, tribal civil

tribal courts poses such grave threats to tribal sovereignty and practical problems of proof that state courts should follow a “bright-line rule” of dismissing cases whenever their choice-of-law principles point toward tribal substantive law.³⁰⁹

There are legitimate reasons for skepticism about the value to tribes of having their law applied in state courts. Commentators have worried, first, that state-court adjudication of tribal disputes will weaken the power of tribal courts. Maintaining a distinctively Indian judiciary is important because it allows a tribe’s traditional methods of decision-making to survive. Some tribal court systems, such as that of the Cherokee Nation, may be centuries old; such courts are generally an integral part of tribal life.³¹⁰ Even if the tribe adopts some Anglo traditions or procedures,³¹¹ tribal court is a place where the tribe asserts its sovereignty by making and enforcing its laws and customs. State-court application of tribal law may interfere with all these benefits by undermining the work of tribal courts. Further, tribal and state courts are to some extent in competition for litigants and resources. If state courts are permitted to apply tribal law, such courts may become even more attractive alternatives, luring some plaintiffs away from tribal court.

jurisdiction was “not similarly restricted.” *Id.* at 15.

³⁰⁹ See John J. Harte, *supra* note 9, at 95. Harte argues that “[t]ribal courts, and tribal courts alone, should interpret tribal law,” since only tribal courts are equipped to make decisions regarding the “extent of what is necessary to protect tribal self-government” under the standard announced in *Montana*. Further, Harte argues, application of tribal law in state court may present insurmountable practical problems: state and tribal courts have “fundamental value differences,” and tribal law may be difficult or impossible to prove, especially since those most familiar with it are tribal elders who “may not speak English or may not be permitted to divulge important tribal ideals in an open and alien state courtroom.” *Id.* at 91-92. Harte acknowledges one danger of his approach: that, rather than dismissing a case, state courts will manipulate their choice-of-law principles in order to find that forum law, rather than tribal law, applies. *Id.* at 99.

³¹⁰ The courts of the Cherokee Nation claim roots in tribal dispute-resolution processes dating back to the 1600s; the tribe has maintained a formal court system intermittently since at least 1839. See <http://www.cherokee.org/TribalGovernment/JudicialBranch.asp>; Leeds, *supra* note 26, at 319, 322.

³¹¹ For a discussion of some ways in which tribal courts integrate traditional and Anglo practices, see Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. Rev. 225, 250-55 (1994).

State courts can also hinder the work of tribal judiciaries in a more basic way — by failing to get the law right, or by failing to understand the cultural and procedural background that may be integral to the law’s application. Such concerns are particularly acute because state-court interpretations of tribal law are unlikely to be subject to any further level of review.³¹² Sometimes state courts may be overwhelmed by the sheer unfamiliarity of tribal law,³¹³ but judges may also become confused when state and tribal laws superficially resemble each other. Judith Royster, for example, has noted that the frequently used tribal tort standard of “carelessness” is subtly different from the state-law standard of “negligence,” and that nontribal courts may blur the distinction.³¹⁴ Because of the potential for this sort of misunderstanding, both Indians and non-Indians affected by tribal-law issues may prefer to have tribal law applied by a judge who knows it well.

While these dangers are real, however, they fail to tell the whole story. To begin with, as commercially significant off-reservation dealings by tribes and individual Indians become increasingly routine, some growth in the proportion of cases implicating tribal interests heard in state court is inevitable.³¹⁵ In fact, under some circumstances, cases against non-Indians are funneled to state courts by tribal design; some tribal codes do not provide for jurisdiction over non-Indians who do not consent to have disputes litigated there, meaning that Indian plaintiffs who wish to sue non-Indians must go to state court.³¹⁶ The problem may be even worse in P.L.

³¹² See Harte, *supra* note 9, at 98.

³¹³ Complicated issues of establishing the content of tribal law arose, for example, in *John v. Baker*, 30 P.3d 68 (Alaska 2001), and *People by Abrams v. Anderson*, 137 A.D.2d 259 (1988).

³¹⁴ See Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. Kan. L. Rev. 241, 242, 247 (1998). See also Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. Rev. 225, 226 (1994).

³¹⁵ Reynolds, *supra* note 6, at 560 (1997).

³¹⁶ See Canby, *supra* note 17, at 178. Given the uncertain and shifting boundaries of tribal jurisdiction over

280 states, since one effect of P.L. 280 has been to impede the development of tribal judicial systems in affected states.³¹⁷ Tribal litigants in P.L. 280 states may therefore find that no tribal forum is available to hear their case.³¹⁸ Where state courts essentially have exclusive jurisdiction by default, concerns about competition with tribal courts are largely inapplicable.

In such circumstances, state-court application of tribal law can allow tribes to have some voice in a wider array of cases. As Laurie Reynolds has argued in a thoughtful article, a principle that “state courts may freely ignore tribal interests in any dispute displaying off-reservation contacts” will hardly work to the advantage of either tribes or tribal courts.³¹⁹ As the sphere in which tribes can directly assert power over nonmembers has diminished, some tribes have come to reject the absolutist ideal of sovereign autonomy — what Robert Laurence has wryly described as “the increasingly unfettered power to do less and less.”³²⁰ For some tribes, that is, the exclusive right to have tribal laws interpreted in tribal court may be less important than the ability to exert influence over transactions that affect tribal lands and communities — a goal that may be best accomplished by allowing state and federal courts to apply tribal law.

In addition to such lesser-of-two-evils rationales for applying tribal law, there may be more affirmative benefits to tribes. Application of tribal law may foster a greater sense of

nonmembers, it is understandable that many tribes might prefer to err on the side of simplicity and caution.

³¹⁷ See Vanessa J. Jiminez and Soo C. Song, *Concurrent State and Tribal Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1635 (1998).

³¹⁸ See Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 McGeorge L. Rev. 1032, 1035 (2000) (discussing problems that can arise when no tribal forum exists).

³¹⁹ *Id.*

³²⁰ Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries*, 27 Conn. L. Rev. 979, 981 (1995). For an example of this shift in attitude among some tribes, see J.R. Mueller, *Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums?* 3 Tribal L.J. 1 (2002-2003) (advocating increased application of Navajo tort-law principles in nontribal forums).

cooperation between tribal and state courts, permitting state courts a basic understanding of tribal procedures that may help reduce suspicion and miscommunication when the state court is asked to grant full faith and credit to tribal judgments or stay its proceedings in favor of a related suit in tribal court. Such cooperation is likely to become increasingly important as tribes' economic well-being comes more and more to depend on finding fair and efficient ways exist to resolve cases that span reservation boundaries. When multimillion-dollar disputes arise between tribal corporations and their contracting partners — as is increasingly likely in the age of tribal gaming — both parties' interests are served when the judicial system as a whole is able to minimize opportunities for forum-shopping and inconsistent results.³²¹

Where states and tribes have concurrent jurisdiction, the absence of well-defined rules and procedures for managing interjurisdictional conflicts encourages litigants to forum shop aggressively and creates the potential for procedural quagmires.³²² State and tribal courts may, for example, compete to be the first to reach judgments. Litigants who suspect that tribal proceedings will fail to go their way may choose to ignore them in hopes that their

³²¹ See Thorington, *supra* note 318, at 1035 (discussing the confusion and opportunity for forum-shopping that results from the inconsistent application of tribal law).

³²² A particularly egregious example is the case of *Teague v. Bad River Band*, 236 Wis. 2d 384, 387-88 (2000), which presented a dizzying array of interforum conflicts. A non-Indian contractor filed suit in state court alleging that the Bad River Band had waived its sovereign immunity. *Id.* The Band, meanwhile, took the case to tribal court for resolution of the same question. *Id.* at 393. In part because the contractor refused to participate in the tribal proceedings, the tribal court swiftly reached a judgment in the Band's favor. The state trial court, however, refused to give full faith and credit to the tribal judgment, finding that that the Band's filing of the second suit in tribal court constituted "fraud and coercion"; further, it reached an opposite result on the substantive tribal-immunity question. *Id.* at 392-93. Faced with an unappetizing choice between rewarding "the winner of the race to the courthouse" or "the winner of the race to judgment," *id.* at 403, the Wisconsin Supreme Court remanded the case for the two courts to confer, noting in passing that the adoption of procedures to govern such a situation was acutely needed. *Id.* at 404-05. Despite the state supreme court's hopes, however, cooperation between the state and tribal courts did not result. On remand, the state circuit court denied the Band's request to open the judgment. *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians* ("Teague III"), 265 Wis. 2d 64, 72-73 (2003). The Wisconsin Supreme Court, hearing the case once again on appeal, finally resolved the instant dispute by holding in a fractured opinion that the tribal judgment was entitled to full faith and credit. Even so, the judges sharply disagreed about the rationale.

nonparticipation will cast doubt on the proceedings' legitimacy.³²³ When jurisdiction is available in two courts with sharply different cultural and legal perspectives, forum choice may be entirely determinative of the outcome, heightening incentives for procedural maneuvering and casting doubt on the legitimacy of both courts' proceedings.³²⁴ In such cases, encouraging state courts to apply tribal law in appropriate circumstances fulfills a classic function of choice-of-law doctrine — avoiding a situation in which a plaintiff's choice of court determines a case's outcome. Further, heightened awareness of the differences between tribal and state law has the potential help state courts head off certain forum-conflict problems from the start — by, for example, alerting them to the need to stay a state case in favor of tribal proceedings when it is clear that the case involves complex tribal-law issues.

It is also important to note that it is far from impossible for state courts to apply tribal law carefully and accurately. Although certain elements of tribal law may be as arcane and complex as state courts have sometimes feared, most disputes that find their way into state court do not involve complicated matters of internal tribal relations; rather, they implicate narrow principles of tribal tort and commercial law. In such cases, while the applicable tribal law may not mirror exactly the law of any given state, it is likely to present the sort of conflicts with which state courts are familiar — issues such as whether punitive damages are available,³²⁵ whether a judicial process must precede repossession of property,³²⁶ or whether an oral contract

Id. at 91-92, 98-99.

³²³ *See id.* at 393.

³²⁴ In *Teague*, for example, it was clearly in the non-Indian plaintiff's best interest to have the case decided by a state judge skeptical of the Bad River Band's sovereign immunity argument, while it was equally logical for the Band to seek a tribal judge who was more receptive to (and perhaps more knowledgeable about) its claims of sovereign immunity under tribal law.

³²⁵ *Cheromiah*, 55 F. Supp. 2d at 1302-05 (D.N.M. 1999).

³²⁶ *Belone*, 74 P.3d 67.

modification is enforceable.³²⁷ Moreover, even when the legal issues involved are less straightforward, finding and establishing the content of tribal law in state court need not be complicated. State reforms in recent years have made establishing the content of foreign law easier in general — by, for example, allowing courts to take judicial notice of such law rather than requiring it to be proven.³²⁸ In addition, the court systems of many larger tribes are increasingly well-financed and well-established, often with extensive, Web-searchable libraries of decisions or equivalent resources.³²⁹

Further, the legitimate concerns about application of tribal law in state court might be better addressed by developing strategies to funnel certain cases and issues into tribal court, rather than banning state-court application of tribal law entirely. State courts can, for example, give tribal courts preference in deciding tribal disputes, while remaining willing to apply tribal law where the tribal court is inconvenient or unavailable. Courts can also develop procedural mechanisms to facilitate consideration of tribal-law issues in state court while insuring that states do not infringe on tribal autonomy. For example, many commentators have advocated increased use of certification procedures for tribal-law questions.³³⁰ A few tribes already have enacted laws permitting state and federal judges to certify questions to their courts,³³¹ and some nontribal

³²⁷ *Warm Springs*, 300 Ore. 617.

³²⁸ See, e.g., *id.* at 633-34 (discussing wider availability of judicial notice for foreign law); Uniform Interstate and International Procedure Act, Art. IV (authorizing courts, in determining the content of foreign law, to “consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence”).

³²⁹ For example, the National Tribal Justice Resource Center maintains a searchable database of codes, constitutions, by-laws, and judicial opinions from more than 50 tribes. See Tribal Justice Resource Center, <http://www.tribalresourcecenter.org>.

³³⁰ See Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 330, 351-55 (1989); Tebben, *supra* note 267, at 187-88 (2001).

³³¹ See Pommersheim, *supra* note 331, at 168 n.172 (citing Mille Lacs Band Stat. Ann. tit. 24 § 3001 (1996), which uses language similar to section 3 of the widely enacted state Uniform Certification of Questions of Law Act, and Hopi Tribal Code § 1.2.8 (1992)).

courts have entertained plaintiffs' requests to certify issues of tribal law to tribal courts.³³² In the tribal law setting, certification presents an ideal opportunity for state courts to become familiar with tribal decision-making processes in a neutral, mutually respectful context. The use of certification procedures allows tribes to enjoy the wider authority that would come from application of their law in state courts, without denying them the sovereign prerogative to issue final pronouncements on their law's content. Certification would be particularly useful in situations where tribal substantive law is closely intertwined with procedure; in such cases, tribes could preserve the integrity of traditional decision-making processes while retaining influence in the outcome of state-court cases.

The doctrine of *forum non conveniens* or other discretionary abstention doctrines may also be useful for achieving similar ends in cases where a tribal forum is available to hear a case initially brought in state court.³³³ A finding of *forum non conveniens* allows a court to discretionarily dismiss a case when the forum of a different jurisdiction is better situated — for both practical and cultural reasons — to hear it. In international contexts, courts consider several central factors in deciding whether to dismiss the case on the ground of *forum non conveniens*, including both issues “pertaining to the private interests of the litigants,” such as ease of access to sources of proof, the cost of obtaining witnesses, and other practical issues, and “public factors” such as the interest in “having localized controversies decided at home” and the avoidance of “the application of foreign law.”³³⁴ Many of these factors will often be present in the Indian-law

³³²See *Bryant ex rel. Bryant v. U.S.*, 147 F. Supp. 2d 953, 956-57 (D. Ariz. 2000) (considering request for certification of questions of Navajo law to the Navajo Supreme Court, but ultimately concluding that tribal law did not apply to the case).

³³³See generally *Harte*, *supra* note 9.

³³⁴See *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

context as well, since the state court may be distant geographically from tribal occurrences and may be wholly unfamiliar with tribal law, while parties may find it difficult to bring witnesses to a sometimes-distant state court.

Because *forum non conveniens* allows courts to consider a variety of factors particular to the individual case, it provides a great deal of flexibility to individual judges. Further, since *forum non conveniens* determinations are often made contingent on the availability of an alternative forum,³³⁵ the doctrine also allows state courts to permit tribal courts a first chance to consider difficult issues of tribal law while retaining the prerogative to hear the case if no tribal forum proves to be available.

Finally, the choice-of-law process itself affords opportunities for states to take tribal interests into consideration. Tribes that value internal decision-making procedures, fear competition from state courts, or worry about distortion of tribal law in the hands of outsiders can adopt a formal policy opposing state-court application of their law. Tribes could also, of course, sanction the application of certain areas of tribal law (commercial law, for example) by state courts, while specifying that other aspects of tribal law (such as those touching on family relations) are matters of internal tribal relations to be decided by the tribe alone. Because most choice-of-law regimes allow state courts to take public-policy issues into account when deciding which sovereign's law to apply,³³⁶ state courts would be able to consider the preferences of tribes when deciding whether or not to apply tribal law. State courts would also have an additional incentive to avoid the application of tribal law when it is contrary to the tribe's preference, since

³³⁵ See, e.g., *Stangvik v. Shiley, Inc.*, 54 Cal. 3d 744 (1991).

³³⁶ See *Yahoo*, *supra* note 94.

there is a greater danger that such a practice would violate the tribe's right to "make [its] own laws and to be ruled by them" and hence run afoul of the central principle of *Williams*.

As a last note, any argument that state application of tribal law will lead to conflict or misunderstanding must grapple with the fact that many state courts have already committed themselves to a process of interpreting tribal law in an area in which issues of cross-cultural understanding are likely to prove far more problematic. This statement refers, of course, to many state courts' refusal to give automatic full faith and credit to tribal judgments.³³⁷ Procedures in the majority of states dictate that state courts must examine tribal judgments for fairness and procedural regularity before making a decision whether to enforce them. To take a representative statute, Wisconsin allows state courts to examine tribal judgments based on a number of criteria, including whether they were "procured in compliance with procedures required by the rendering court."³³⁸

Ironically, such requirements often require state courts to examine tribal law far more extensively than would be necessary if they were to apply directly a substantive point of tribal law. State courts deciding whether to enforce tribal orders must often undertake a detailed examination of tribal-court procedures as well as tribal-law substance. Suppose, for example, that the party resisting enforcement of a tribal judgment contends that the tribal judge violated standards of due process by applying a tribal ordinance inconsistently in his case.³³⁹ In order to

³³⁷ See *supra* note 26.

³³⁸ Wis. Stat. § 806.245(4)(e).

³³⁹ This brief discussion does not even consider the question of whether Anglo-American notions of "due process" should necessarily be applied as a standard by which to measure proceedings in tribal courts. Many tribes adhere to cultural principles that are inconsistent with those notions. Some tribal judicial systems, for example, may emphasize repairing relationships among the parties rather than determining winners and losers. Guided by such principles, certain tribes may see little problem with, for example, the existence of personal ties between the judge and one or both parties — even though this situation would certainly offend Anglo due process norms.

assess the validity of that claim, the court must have at least a general understanding of the content of that ordinance and the procedures by which it is normally applied. The court must also be able to review the tribal proceedings in the individual case to determine whether the tribal court applied those procedures in a fashion inconsistent with usual practice. Making such determinations on a reasonably principled basis, therefore, may require the court to immerse itself thoroughly in the details of tribal law. Further, many orders that tribal litigants seek to enforce beyond reservation borders concern time-sensitive, sometimes emotionally charged issues, such as restraining orders in domestic violence cases and child custody determinations.³⁴⁰ Such background realities are, of course, unlikely to make the job of state courts any easier.

By contrast, where state conflict-of-law principles dictate the application of tribal law, the issues are likely to be less complex.³⁴¹ By definition, tribal issues that appear in state court virtually always involve a mix of on-reservation and off-reservation contacts. Where tribal law on the subject exists, therefore, it is often law that the tribe has enacted in the knowledge that it may be applied to dealings with nonmembers. For that very reason, it may more closely tailored to off-reservation situations and more easily translated into Anglo norms. It is notable that most of the cases discussed in this Article do not involve fundamental cultural clashes, but more

³⁴⁰ See generally Leeds, *supra* note 26.

³⁴¹ There are, of course, exceptions. In *People by Abrams v. Anderson*, 137 A.D.2d 259 (1988), for example, a New York State courts exercised jurisdiction over an intratribal dispute pursuant to a unique federal provision, 25 U.S.C. § 232-233, a P.L. 280-like statute that grants New York courts jurisdiction over “civil actions and proceedings between Indians.” The case arose out of a bitter intratribal dispute about a bingo hall operated by an unincorporated association of tribal members. The bingo hall’s operators argued that it was authorized by tribal custom; the tribe’s Council of Chiefs, however, argued that the hall was illegal under an 1885 tribal law prohibiting gambling. The dispute ultimately descended into violence and chaos, and it seems unlikely that the New York courts’ ultimate resolution of the case — which supported the bingo hall operators despite the fact that the federal government recognized the Council of Chiefs as the tribes’ governing authority and supported their position that the bingo hall was illegal — did much to restore tribal harmony. Because *Abrams* involved a hotly contested and wholly internal tribal dispute, there is a strong case that the state courts should have dismissed it (or attempted to refer it to some form of tribal resolution) on public policy grounds.

mundane and familiar matters: whether punitive damages are allowed or limited, the judicial process required before property can be repossessed, and so on. Relative to the complicated procedural matters that state courts often encounter in the full faith and credit context, these issues are likely to be relatively straightforward.

Conclusion

A place exists for tribal law in state courts. Even allowing for the unusual features of tribal sovereignty, state choice-of-law principles, applied neutrally and consistently, should frequently point to tribal law as the decisional law in many cases. The Supreme Court's decision to treat the problem of cases with mixed state and tribal contacts as solely a question of jurisdiction and forum choice has obscured the potential a choice-of-law approach offers to advance the interests of tribes and resolve the procedural dilemmas of litigants. As long as proper safeguards are in place, state courts should be encouraged to analyze cases involving tribal contacts in choice-of-law terms.